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Crisis, Continuity, and Change in International Investment Law and Arbitration

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CRISIS, CONTINUITY, AND CHANGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION

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"Strive not Leuconoe! To know what end
The gods above to me, or thee, will send.
. . . Whilst we are talking, envious time doth slide,
This day's thine own, the next may be deny'd."[1]

"All things hang like a drop of dew upon a blade of grass."[2]

I. INTRODUCTION

Can international law embrace the fluidity of time and successfully manage change? The debate over continuity and change lies at the heart of international law, which seeks to foster peaceful, just, and prosperous relations among nations.[3] International law endeavors to govern the future by applying, in the present, the legal heritage of the past. Nonetheless, everything flows, and in an ever-changing world, some change is needed within the international legal system to ensure its stability, especially in times of crisis. Not only can crises constitute "catalyst[s] for the development of international law," but they can test, undermine, or ultimately buttress the structure of international law.[4]

The issue of continuity and change in international law has traditionally been framed as a dialectical oscillation between the basic pillar of international law, the principle of *pacta sunt servanda* (treaties should be complied

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1. HORACE'S ODES: ENGLISH AND IMITATED BY VARIOUS HANDS 19 (Charles F. W. Cooper ed., Sir Thomas Hawkins trans., 1880) (quoting Book I, Ode 11).

2. W.B. Yeats, *Gratitude to the Unknown Instructors*, *in* W.B. YEATS, COLLECTED POEMS OF W.B. YEATS 254 (Richard J. Finneran ed., rev. 2d ed. 1996).

3. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 278–280 (2011).

4. Hilary Charlesworth, *International Law: A Discipline of Crisis,* 65 MOD. L. REV. 377, 382 (2002).

with), and its classical antagonist, the *rebus sic stantibus clause* (or fundamental change of circumstances). In principle, treaties govern international relations, and their permanence enables the stability, legal certainty, predictability, and functioning of the international system. A certain degree of flexibility, however, is often necessary to maintain a balance between the rights and obligations within a treaty. In times of crisis, extraordinary times call for extraordinary measures.

This article explores the connection between continuity and change in international law by investigating how this interaction unfolds in international investment law and arbitration. In particular, it uses the coronavirus pandemic as a focus for analysis. The coronavirus pandemic constitutes a yet unresolved global crisis that poses many challenges to states and international organizations alike. Although pandemics are not unprecedented, they amount to the paradigmatic examples of life-threatening crises, requiring the adoption of new ways of thinking and novel solutions in different areas of the law. Therefore, such a crisis will somehow influence the development of international law in general and international investment law in particular. It will necessarily determine both continuity and change, "offer[ing] a lens" through which the balance between continuity and change can be observed.[5] The article seeks to answer the following question: can international investment law successfully address the challenges posed by the coronavirus crisis? Or will the pandemic "change the world of international arbitration as we know it"?[6] In dealing with these questions, the article provides an overview of the issues that may arise at the intersection of public health and international investment law. It highlights ways in which international investment law can contribute to the development of international law and ensuring the right balance between continuity and change.

The ongoing health crisis has "ended and upended lives around the globe."[7] As of January 24, 2021, COVID-19, the disease caused by coronavirus,[8] has killed more than two million people worldwide.[9] Furthermore,

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5. *Id*. at 377.

6. Gary L. Benton, *How Will the Coronavirus Impact International Arbitration?* KLUWER ARB. BLOG, (Mar. 13, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/?print=pdf.

7. Katharina Pistor, *Introduction*, *in* LAW IN THE TIME OF COVID-19 xi (Katharina Pistor ed., 2020).

8. COVID-19 indicates the disease caused by a new strain of coronavirus that previously had not been identified in humans, called the severe acute respiratory syndrome coronavirus 2 (SARS-Cov2). *See Coronavirus*, WORLD HEALTH ORG., https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Nov. 6, 2020) (reporting "Most people infected with the COVID-19 virus will experience mild to moderate respiratory illness and recover without requiring special treatment. Older people, and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.").

9. *Weekly Operational Update on COVID-19,* WORLD HEALTH ORG. (Jan. 24, 2021), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports.

many more cases may be unreported or undetected due to the scale and features of the pandemic. The World Health Organization ("WHO") declared the virus a public health emergency of international concern on January 30, 2020, which marks it "an extraordinary event" that is "serious, unusual or unexpected" and may require international action.[10] On March 11, 2020, the WHO declared it a pandemic.[11] The U.N. Secretary-General, Antonio Guterres, warned that the world today is facing the most challenging crisis since World War II[12] and that COVID-19 represents "the fight of a generation" and a "threat to world peace and security."[13]

In response to the pandemic, states have adopted a wide range of public health policies. Such measures include taking control of private property; imposing price caps or suspending utility payments; compelling private companies to produce certain goods; closing non-essential businesses; closing borders; and impeding the flow of people, goods, and services. Governments have placed cities, regions, and entire countries under lockdown. Moreover, the social and economic consequences of the pandemic may require further regulatory measures in the future.[14]

These public health measures have brought economic life to a near standstill and have inevitably affected many foreign investors. Import bans, quarantine measures, travel restrictions can particularly affect business with an international core. Investment treaties typically include a range of substantive standards of protection, including the prohibition of unlawful expropriation, the fair and equitable treatment standard, and the principle of non-discrimination.[15] Such standards may now become the basis for investor claims against state measures. Indeed, some investors will likely file claims against states before arbitral tribunals for breaches of international investment treaties. If investors can demonstrate breaches of substantive treaty provisions, states, in turn, will use defenses that are either based on the ap-

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10. Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus, WORLD HEALTH ORG., (Jan. 30, 2020), https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

11 *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19,* WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—-11-march-2020.

12. *Coronavirus: Greatest Test Since World War Two, Says UN Chief*, BBC NEWS (Apr. 12, 2020), https://www.bbc.com/news/world-52114829.

13. Helen Davidson, *Coronavirus Threat to Global Peace and Stability, UN Chief Warns*, GUARDIAN (Apr. 10, 2020), https://www.theguardian.com/world/2020/apr/10/coronavirus-threat-to-global-peace-and-stability-un-chief-warns.

14. Eric Richardson & Colleen Devine, *Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights*, 42 MICH. J. INT'L L. 105 (2021).

15. *See generally* DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW (2016).

plicable treaty or those generally available under customary international law. Arbitral tribunals will have to assess how states treated foreign investors and their investments in this crisis. Should an investor seek relief in the context of a global pandemic that arguably requires states to adopt economically harmful measures to serve the best interest of the world population as a whole? Can governments avoid or minimize violations of international investment law when responding to the pandemic? How should arbitral tribunals adjudicate pandemic-related claims?

This article examines some of the most pressing legal issues raised by the pandemic for international investment law and arbitration. It does not provide legal advice, but instead identifies and discusses crucial legal issues and provides guidance to policymakers about the legal challenges ahead. It proceeds as follows. After having identified some of the key pressing issues in Part I, Part II briefly addresses a range of procedural matters. Part III then focuses on substantive aspects, namely, the kinds of claims that can be filed. Part IV further explores specific flexibility mechanisms, that is, state defenses. In this way, the article provides an overview of the issues that may arise at the intersection of public health and international investment law and highlights simple ways in which international investment law can contribute to the development of international law and ensuring the right balance between continuity and change. The article ultimately concludes that both continuity and change are necessary for ensuring the health and wealth of nations and justice among them.

II. PROCEDURAL MATTERS

Due to the specific features of the ongoing pandemic, namely the fact that possible modes of transmission for SARS-CoV-2 include droplet and airborne transmission, virtual proceedings have become more and more common.[16] Virtual proceedings in investment arbitration have already been used in the past decade.[17] Indeed, several proceedings before arbitral tribunals have long been performed at a distance, whether telephonically or online.[18] The rationale for the early adoption of technological innovation in arbitration was largely one of "economy in time and cost." Such innovation has also indirectly reduced the sector's carbon footprint.[19] According to

16. *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions, Scientific Brief*, WORLD HEALTH ORG. (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions.

17. *See* George Bermann, *Dispute Resolution in Pandemic Circumstances*, *in* LAW IN THE TIME OF COVID-19 167, 168–69 (Katherina Pistor ed., 2020).

18. *Id*. at 168.

19. Lucy Greenwood & Kabir A.N. Duggal, *The Green Pledge: No Talk, More Action*, KLUWER ARB. BLOG (Mar. 20, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/?print=print.

Berman, the present pandemic is only hastening arbitration's change "down a path it was destined to travel anyway."[20] While arbitral institutions revise their rules every several years, the ongoing pandemic has accelerated the existing trends in investment arbitration, such as increasing use of electronic communication. In 2019 alone, about sixty percent of the 200 hearings and sessions organized under the aegis of the International Center for the Settlement of Investment Disputes ("ICSID") were held via video-conference.[21] The ICSID and other arbitral institutions have developed video-conference systems for individual arbitrators' service and have secured cloud-based file-sharing platforms for their cases.[22]

Many major arbitral institutions have also continued their operations during the crisis. For example, the ICSID, the International Chamber of Commerce ("ICC"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), the London Court of International Arbitration ("LCIA"), and the Hong Kong International Arbitration Centre ("HKIAC") all remain operational at the time of this writing, having implemented remote working or other arrangements in compliance with applicable state regulations.[23]

Several arbitral rules explicitly enable tribunals to conduct hearings remotely.[24] Leading arbitral institutions have thus gradually promoted the use of online tools. For instance, the ICSID has published a guide to online hearings.[25] The ICC has also recently issued a Guidance Note, including "a checklist for a virtual hearing protocol that will ensure each party is treated equally and given a full opportunity to present its case."[26] The note illustrates the procedural tools available to them "to mitigate the delays generated by the pandemic" and "provides guidance concerning the organi[z]ation of conferences and hearings in light of COVID-19 considerations, including

20. Bermann, *supra* note 17, at 174.

21. *Id*. at 169.

22. *See id*. at 169–70.

23. *Conducting International Arbitrations During the COVID-19 Pandemic*, DEBEVOISE & PLIMPTON (Apr. 21, 2020), https://www.debevoise.com/insights/publications/2020/04/conducting-international-arbitrations-during-covid.

24. *See, e.g*., International Chamber of Commerce ["ICC"] Arbitration Rules art. 24 ¶ 1 (2017); London Court of International Arbitration ["LCIA"] Arbitration Rules art. 19 ¶ 2 (2014).

25. *International Center for Settlement of Investment Disputes ["ICSID"], A Brief Guide to Online Hearings at ICSID*, ICSID NEWS & EVENTS (Mar. 24, 2020), https://icsid.worldbank.org/en/Pages/News.aspx?CID=362.

26. Yvonne Mak, *Do Virtual Hearings Without Parties' Agreement Contravene Due Process? The View from Singapore*, KLUWER ARB. BLOG (June 20, 2020), http://arbitrationblog.kluwerarbitration.com/2020/06/20/do-virtual-hearings-without-parties-agreement-contravene-due-process-the-view-from-singapore/.

conducting such conferences and hearings by audioconference, videoconference, or other similar means of communication."[27]

Virtual proceedings clearly pose specific challenges. The growing digitalization of the arbitral process will likely not affect the written stage of arbitration proceedings as much as it will affect oral hearings, which often involve multiple participants. The organization of online proceedings can face several difficulties, including participating parties being present in several different time zone and selecting arbitrators and legal teams who are comfortable with remote technology. Potential technological failures and connectivity issues also must be taken into account. Some flexibility is necessary to accommodate possible delays in the issuance of awards due to the impossibility of site visits, the lack of access to paper files stored in physical offices, and the potential for possible sudden changes in the availability of lawyers, arbitrators, and clerks.

Various concerns have also arisen concerning the cybersecurity of video arbitrations.[28] While conducting hearings virtually, parties may work from home on unsecured networks.[29] Hackers could "launch cyber-attacks on new and vulnerable remote working infrastructure and hijack video conference calls."[30] Lack of adequate cybersecurity in international investment arbitration can "affect the integrity of the arbitral process and expose confidential and commercially sensitive information."[31] The convenience of easy-to-use tech products should not be prioritized over fundamental issues such as data security and privacy. The security architecture of tech products must be ascertained before adopting them as communication platforms.[32] For this reason, arbitral venues such as ICSID are developing their own platforms to protect privacy and confidentiality. Several arbitral institutions, including ICC, have published guidance on data protection and cybersecurity.[33]

Other important concerns around virtual proceedings relate to their effect on due process.[34] While there is a desire to run arbitrations efficiently, arbitrators and parties should carefully consider the implications of online proceedings for the parties' right to due process, which requires that the par-

27. INT'L CHAMBER COM., ICC GUIDANCE NOTE ON POSSIBLE MEASURES AIMED AT MITIGATING THE EFFECTS OF THE COVID-19 PANDEMIC (2020).

28. Myfanwy Wood & Lucy McKenzie, *Arbitration and COVID-19: Cybersecurity and Data Protection*, ASHURST (July 8, 2020), https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19—-cybersecurity-and-data-protection.

29. *Id*.

30. *Id*.

31. *Id*.

32. *See* Brian X. Chen, *The Lesson We are Learning from Zoom*, N.Y. TIMES (Apr. 8, 2020), https://www.nytimes.com/article/zoom-privacy-lessons.html.

33. *See, e.g.*, INT'L CHAMBER COM., ICC COMMISSION REPORT: INFORMATION TECHNOLOGY IN INTERNATIONAL ARBITRATION 15 (2017) https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf; *see also* Wood & McKenzie, *supra* note 28.

34. Mak, *supra* note 26.

ties be treated fairly and granted a reasonable opportunity to present their case. Concerns have arisen regarding counsels' and arbitrators' ability to assess witness credibility in virtual testimony.[35] In addition, there are concerns related to a party's inability to consult with counsel in real time.[36]

Cross-examination may also be complicated to administer through videoconference.[37] For instance, "it is nearly impossible to ensure that the fact witness is not accompanied by someone unauthorized in the room during the hearing."[38] Only authorized persons can participate in hearings, unless these are public. Moreover, the party who had objected to a virtual hearing may later apply to set aside the award.[39] Perceived procedural imperfections can be caused by technical issues or an inadequate internet connection. All of these issues may create grounds for the losing party to challenge a rendered award. The losing party may oppose the enforcement of the resulting award under article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the New York Convention), arguing a violation of due process.[40] A party to an ICSID arbitration may similarly seek annulment of the award, invoking a serious departure from a fundamental rule of procedure.[41] Reportedly, Spain has challenged an ICSID tribunal decision to hold virtual hearings.[42]

In conclusion, parties to arbitrations should seriously consider whether and to what extent to conduct their arbitrations online. And the arbitral tribunal should take the preferences and concerns of the parties into account when deciding whether to conduct a hearing virtually. While there is a risk that the parties may attempt to delay proceedings by refusing to nominate a tribunal, appear in hearings, or respond to the tribunal's requests, arbitral tribunals should nonetheless be sensitive to the parties' requests given the extraordinary circumstances and conduct a case-by-case assessment. In

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35. *Virtual Hearings–the New Normal*, GLOB. ARB. REV. (Mar. 27, 2020), https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal.

36. *Id*.

37. *Id*.

38. Ahmed Bakry, *The COVID-19 Crisis and Investment Arbitration: A Reflection from the Developing Countries*, KLUWER ARB. BLOG (Apr. 21, 2020), http:/arbitrationblog./kluwerarbitration.com/2020/04/21/the-covid-19-crisis-and-investment-arbitration-a-reflection-from-the-developing-countries/.

39. Mak, *supra* note 26.

40. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

41. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(d), *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

42. Cosmo Sanderson, *ICSID Panel Challenged Over Decision to Hold Virtual Hearing*, GLOB. ARB. REV. (Aug. 14, 2020), https://globalarbitrationreview.com/article/1230019/icsid-panel-challenged-over-decision-to-hold-virtual-hearing.

striking the right balance between continuity and change, they should focus on both the efficiency and the fairness of their decision on the matter.

III. INVESTMENT TREATY CLAIMS

In the context of a pandemic, states have traditionally adopted measures that have affected their citizens' way of life and productivity. The closure of borders, quarantine measures, travel bans, and lockdowns can severely affect businesses. Should an investor seek relief in the context of a global pandemic that arguably requires states to adopt such measures to protect public health? In order to address this question, this article looks at three perspectives in this subsection: moral, economic, and legal. From a moral perspective, the current crisis is affecting the most vulnerable members of societies all across the globe, and endorsing solidarity can help the international community to overcome the crisis successfully and become more resilient. Therefore, these times may present an opportunity for companies to be socially conscious. Companies' voluntary contributions to fight the pandemic have been welcome, demonstrating that both domestic and foreign investors can play a key role in the fight against the pandemic.[43]

From an economic perspective, many companies will have to rebuild their businesses and may wish to minimize the time spent on litigation, which can be time-consuming, unpredictable, and expensive. Before filing claims, companies should seriously consider the possible backlash, negative publicity, and waste of time that may result from such claims. They should also ponder whether filing an investment treaty claim makes sense, given the unpredictability of the outcome and the high expenses involved. In fact, a deluge of arbitrations risks not only placing a strain on the system of international dispute resolution but could also prevent the adoption of more constructive solutions.

Several investment treaties include cooling-off clauses, which require investors to attempt to reach a settlement with a state before filing an arbitration.[44] In this scenario, investors should consider alternative dispute settlement mechanisms such as mediation and conciliation. The use of such al-

43. Some of these efforts have made headlines. Ellie Violet Bramley, *Prada the Latest Fashion Brand to Make Medical Face Masks*, GUARDIAN (Mar. 24, 2020) (reporting that a number of big fashion companies have turned their efforts towards the fight against the Coronavirus, producing medical face masks); Andrew Scott, *Formula 1 Teams, Carmakers and Aviation Groups Race To Meet Ventilation Challenge*, FORBES (Mar. 25 2020) (reporting that several carmakers cooperated with ventilator manufacturers to help to boost production of the life-saving machines that were urgently needed in the crisis).

44. *E.g.*, Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment art. VI(2), Ecuador-U.S., Aug. 27, 1993, S. Treaty Doc. No. 103–15 ("In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution.").

ternative dispute resolution mechanisms in lieu of litigation or arbitration could reduce transaction costs, lead to contract renegotiation, and/or produce other positive, mutually agreeable, and successful outcomes in a short timeframe.[45] Such mechanisms enable the parties to reach creative outcomes that will allow a mutual win, thus permitting the continuation of viable investor-state relations rather than bringing them to an end.[46]

Finally, from a legal perspective, the mistreatment of aliens by a host state may give rise to responsibility on the international plane.[47] However, state responsibility does not arise out of every incident in which a foreign investor has suffered losses. Investment treaties are not insurance policies against bad business decisions in uncertain times. Rather, state responsibility arises when the host state has fallen short of its international law obligations. If investors have sound claims to assert or claims to defend, the arbitral process can ensure access to justice.[48] Investors can thereby challenge measures that are in breach of investment treaties before arbitral tribunals. Investors should not, however, abuse the arbitral process. Meritless claims harm the relationship between the parties; they are unlikely to be successful, and even if they are, the awards may not be enforced on public policy grounds.

Practitioners Lucas Bento and Jingtian Chen have raised the possibility of establishing a multilateral treaty claims solution or shared compensation schemes.[49] The Columbia Center on Sustainable Investment and some scholars have called for a moratorium or waiver permanently restricting all arbitration claims related to state measures coping with the pandemic.[50] The eventual ratification of a multilateral instrument could constitute a solid legal basis for such global cooperation. A moratorium on investment claims can enable governments to adopt regulatory measures without the fear of

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45. *See* August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

46. Jane Croft & Kate Beioley, *Call to Give Companies 'Breathing Space' on Coronavirus Litigation*, FIN. TIMES (Apr. 26, 2020) (reporting that Lord Neuberger and Lord Phillips, both former Presidents of the UK Supreme Court, encouraged parties to focus on conciliation).

47. Kaj Hober, *State Responsibility and Investment Arbitration*, 25 J. INT'L ARB. 545, 562 (2008).

48. *See* Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, EUR. J. INT'L L. 729, 731, (2009).

49. Lucas Bento & Jingtian Chen, *Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses*, KLUWER ARB. BLOG (Apr.8 2020), http://arbitration blog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/.

50. *Call for ISDS Moratorium During COVID-19 Crisis and Response*, COLUM. CTR. ON SUSTAINABLE INV. (May 6, 2020), http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19/.

lawsuits (the so-called regulatory chill).[51] Such claims would distract governments from the management of the COVID-19 crisis.[52] Finally, damages awarded under investment claims "would weigh heavily against the dire budget crises facing developing countries in the context of the COVID-19 pandemic."[53] Nonetheless, whether states will be willing to establish such schemes remains unclear. Capital exporting countries may be reticent to adopt such a moratorium, as it could affect the interests of their domestic companies. More fundamentally, scholars caution against "creeping authoritarianism," arguing that states should not "abuse their regulatory powers to the detriment of foreign investors."[54]

The section briefly explores the primary substantive treaty standards that could act as the basis for claims arising out of state measures adopted to fight the pandemic, namely fair and equitable treatment, non-discrimination, and expropriation. The section demonstrates that international investment treaties include vague treaty provisions. On the one hand, this vagueness constitutes a risk because there is uncertainty about how arbitral tribunals may interpret such provisions. On the other hand, such ambiguity could also amount to an opportunity because it provides inherent flexibility to international investment treaties. The tribunals' interpretation will be crucial in preserving the delicate balance between continuity and change within the system.

A. *Fair and Equitable Treaty Claims*

The fair and equitable treatment ("FET") standard is nearly ubiquitous in investment treaties.[55] Although there is no commonly accepted definition of this standard, it is generally deemed to include access to justice, due process, good faith, and respect of legitimate expectations of investors.[56] The standard typically requires the adoption of transparent and consistent regulatory frameworks.[57]

Investors may contend that state measures violate due process, are unreasonable or disproportionate, and/or dramatically alter the existing legal

51. Prabhash Ranjan, *Covid-19 and ISDS Moratorium—An Indiscreet Proposal*, OPINIO JURIS (June 15, 2020), http://opiniojuris.org/2020/06/15/covid-19-and-isds-moratorium-an-indiscreet-proposal/.

52. *Id*.

53. *Id*.

54. *Id*.

55. *See* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 218 (1st ed. 2009).

56. *See* U.N. Conf. on Trade & Dev. ["UNCTAD"], *Fair and Equitable Treatment* 12, 53, 80, U.N. Doc. UNCTAD/DIAE/IA/2011/5 (Feb. 2012).

57. *See id*. at 58.

framework, in breach of the fair and equitable treatment standard.[58] However, the fair and equitable treatment standard does not require states to freeze their legal framework.[59] On the contrary, it can accommodate the regulatory change.[60] Due process generally indicates a lack of arbitrariness in decision-making and access to legal remedies.[61] The International Court of Justice distinguished arbitrariness from unlawfulness in international law as follows:

> [I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. . . .To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow that an act was unjustified, or unreasonable, or arbitrary that, that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[62]

The Court added that "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . It is a wilful [sic] disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial property."[63] Provided that a state granted an alien access to its courts and justice was properly administered with adequate procedures, there would be no breach of the fair and equitable treatment standard.

If states first adopted mild responses to the crisis and later intensified such responses, investors may claim that such drastic measures violate the FET standard because of the regulatory change.[64] However, since the beginning of the crisis, all countries around the globe have unavoidably adjusted

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58. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB /10/7, Award, ¶ 488 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents %0D/italaw7417.pdf.

59. EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8 2009), https://www.italaw.com/cases/375 ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.").

60. Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007), https://www.italaw.com/cases/812.

61. *See* Org. for Econ. Coop. & Dev., *Fair and Equitable Treatment Standard in International Investment Law*, 26 (Org. for Econ. Coop. & Dev., Working Papers No. 2004/03, 2004), http://dx.doi.org/10.1787/675702255435 (quoting F.A. Mann).

62. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989, I.C.J. Rep. 15, ¶ 124 (July 20, 1989).

63. *Id*. ¶ 128.

64. *See* Bento & Chen, *supra* note 49.

their policies.[65] While there was very little information available about the virus and the related diseases at the beginning of the pandemic, state authorities slowly confirmed that the virus could transmit from human to human, and states came to discover other features of the virus.[66] Governments were, therefore, forced to respond to the gradual flow of information provided by scientists. As such, it would be unreasonable to presume that states could or should maintain mild responses as the crisis intensified; instead, it is only reasonable to expect that states could temper their responses.

Most tribunals do not employ proportionality type of reasoning for evaluating the breach of fair and equitable treatment.[67] Nonetheless, because some scholars have advocated the use of such analysis in investment arbitration, and such investigation has surfaced in some arbitrations, it seems appropriate to assess whether the proportionality test could be useful in ascertaining whether states have breached the fair and equitable treatment standard. The coronavirus crisis also reveals that the proportionality test is inappropriate to assess public health measures because of the dynamic spread of the pandemic.[68] Some examples may clarify this point. When New Zealand faced its first cases of COVID-19, it opted for "going hard and going early."[69] Prime Minister Jacinda Ardern "imposed a fourteen-day quarantine on anyone entering the country on March 14 and implemented a strict lockdown two weeks later, when fewer than 150 people had been infected and none had died."[70] This action could look disproportionate if one looked at the number of casualties; nonetheless, it proved to be reasonable in light

65. Nick Miroff, Hannah Natanson, Kim Bellware & Katherine Shaver, *States Begin Imposing Harsher Measures to Contain Coronavirus as U.S. Cases Rise Sharply*, WASH. POST (Mar. 16, 2020, 12:20 AM), https://www.washingtonpost.com/health/states-begin-imposing-harsher-measures-to-contain-coronavirus-as-us-cases-rise-sharply/2020/03/15/267577a6-65b3-11ea-acca-80c22bbee96f_story.html.

66. Gideon Meyerowitz-Katz, *Our Knowledge of Covid-19 Changes Every Day. Hindsight is Misleading When it Comes to Science*, GUARDIAN (June 19, 2020, 04:00 PM), https://www.theguardian.com/commentisfree/2020/jun/19/our-knowledge-of-covid-19-changes-every-day-hindsight-is-misleading-when-it-comes-to-science.

67. *See generally* VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2018).

68. Paul L. Delamater, Erica J. Street, Timothy F. Leslie, Y Tony Yang & Kathryn H. Jacobsen, *Complexity of the Basic Reproduction Number (R0)*, EMERGING INFECTIOUS DISEASES, vol. 25, 2019, at 1 (noting that "The basic reproduction number (R0), also called the basic reproduction ratio or rate or the basic reproductive rate, is an epidemiologic metric used to describe the contagiousness or transmissibility of infectious agents. R0 is affected by numerous biological, sociobehavioral, and environmental factors that govern pathogen transmission and, therefore, is usually estimated with various types of complex mathematical models.").

69. Jon Henley & Eleanor Ainge Roy, *Are Female Leaders More Successful at Managing the Coronavirus Crisis?* GUARDIAN (Apr. 25 2020) https://www.theguardian.com/world/2020/apr/25/why-do-female-leaders-seem-to-be-more-successful-at-managing-the-coronavirus-crisis.

70. *Id*.

of the public interest pursued by state policy.[71] As a result of its policies, New Zealand has recorded only twenty-six deaths.[72] Even before it had any confirmed case, Vietnam took drastic measures to prepare for mysterious pneumonia.[73] When the first case was established, the country activated its emergency plan, restricting travel, closing the border with China, increasing health checks at the border, and closing schools.[74] While the measures "seemed to be quite extreme at the time," they "were subsequently shown to be rather sensible" given their success in halting the spread of the disease.[75] In both examples, the state measures have not only saved thousands of lives but have also enabled the respective countries to reopen earlier than many other states. Counter-intuitively, a more gradual action might have led to a disproportionate number of deaths. In countries like Italy, where the virus spread before the implementation of any lockdown, the mortality rate soared.[76] Thus, governments can legitimately adopt precautionary approaches to prevent the spread of the pandemic, rather than wait for the worst to come.[77] However, if given states and tribunals adopted the proportionality criterion, it is worth considering pairing such a strict test with some defer-

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71. Konstantin Richter, *How New Zealand Beat the Coronavirus*, POLITICO (Apr. 14, 2020), https://www.politico.eu/article/kiwis-vs-coronavirus-new-zealand-covid19-restrictions-rules/ (quoting New Zealand Prime Minister Jacinda Adern, "We only have 102 cases . . . But so did Italy once.").

72. Michael G. Baker, Nick Wilson & Andrew Angelmeyer, *Successful Elimination of Covid-19 Transmission in New Zealand*, 383 8 NEW ENG. J. MED. e56(2) (2020); *New Zealand Situation,* WORLD HEALTH ORG., https://covid19.who.int/region/wpro/country/nz (last visited Mar. 10, 2021).

73. Era Dabla-Norris, Anne-Marie Gulde-Wolf & Francois Painchaud, *Vietnam's Success in Containing COVID-19 Offers Roadmap for Other Developing Countries*, IMF NEWS (June 29, 2020), https://www.imf.org/en/News/Articles/2020/06/29/na062920-vietnams-success-in-containing-covid19-offers-roadmap-for-other-developing-countries (citing measures such as extensive contract tracing, containment measures, testing a smaller portion of the population and conducting a mass media campaign to spread awareness).

74. *Id*.

75. Anna Jones, *Coronavirus: How 'Overreaction' Made Vietnam a Virus Success*, GUARDIAN (May 15, 2020), https://www.bbc.com/news/world-asia-52628283 (reporting the comments of Professor Guy Thwaites, Director of Oxford University Clinical Research Unit in Ho Chi Minh City).

76. *Compare* Angela Giuffrida, *Coronavirus Italy: Lombardy Province at Centre of Outbreak Offers Glimmer of Hope*, GUARDIAN (Apr. 8 2020), https://www.theguardian.com/world/2020/apr/08/coronavirus-italy-lombardy-province-at-centre-of-outbreak-offers-glimmer-of-hope (detailing the slowing transmission rate after a lockdown), *with* Anna Bonalume, *Devastated by Coronavirus, Did Bergamo's Work Ethic Count Against It?*, GUARDIAN (Apr. 6, 2020), https://www.theguardian.com/world/commentisfree/2020/apr/06/coronavirus-bergamo-work-ethic-lockdown (discussing the effects of a delayed lockdown).

77. *See generally* CAROLINE FOSTER, SCIENCE, PROOF AND PRECAUTION IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY (2011); Caroline Foster, *Adjudication, Arbitration and the Turn to Public Law 'Standards of Review': Putting the Precautionary Principle in the Crucible*, 3 J. INT'L DISP. SETTLEMENT 525 (2012).

ence.[78] For instance, in Philip Morris, the majority accepted that a margin of appreciation, that is, some deference should be granted: "The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health."[79]

Provided that the adopted measures are rational and reasonable, arbitral tribunals should not second guess measures adopted during a pandemic; rather, they could presume their compatibility with the fair and equitable treatment standard.[80] The existence of international standards can provide a useful benchmark in assessing whether measures are reasonable and thus comply with the fair and equitable treatment provision. For instance, the International Health Regulations ("IHR"), the successor to the International Sanitary Regulations, can constitute a useful benchmark. Such Regulations aim to "prevent, protect against, control and provide a public health response to the international spread of disease."[81] The IHR, which required only a two-thirds majority vote in the World Health Assembly, became binding for all WHO Member States as no state opted out.[82] In 1969, the IHR only addressed cholera, plague, and yellow fever.[83] However, the need to expand their coverage has recently emerged due to the appearance of new diseases and increased travel and trade in past decades.[84] To this end, since their 2005 revision, in force since 2007, the regulations "are no longer limited to specific diseases, but apply more generally to health risks."[85] Under the IHR, the States Parties must:

> [s]trengthen and maintain the capacity to detect, report, and respond rapidly to public health risks of international concern; to respond to requests for verification of information about potential public health emergencies; to assess international health risks and notify WHO promptly of these risks; to carry out inspections and

78. *See generally* VADI, *supra* note 67; CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION (2015).

79. Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 399 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.

80. Valentina Vadi & Lucasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal*, 16 J. INT'L ECON. L. 613(2013).

81. Christopher Dye, *National and International Policies to Mitigate Disease Threats*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y. 2893, 2898 (2012).

82. The World Health Assembly adopted the IHR (2005) on May 23, 2005 by way of resolution WHA58.3. The IHR (2005) entered into force on June 15, 2007. Constitution of the World Health Org. ["WHO"], art. 60(a); Frank P. Grad, *The Preamble of the Constitution of the World Health Organization,* 80 BULL. WORLD HEALTH ORG. 981, 983–84 (1946) (detailing the modalities for adopting regulations).

83. Dye, *supra* note 81, at 2898.

84. *Id*.

85. *Id*.

> control activities at points of entry; and to implement appropriate measures recommended by WHO.[86]

If the WHO considers an illness to be a public health emergency of international concern, it provides recommendations concerning appropriate public health measures for application by the State affected by such an emergency, as well as by other States.[87] These recommendations are temporary.[88] After considering coronavirus to be a public health emergency of international concern, the WHO Emergency Committee adopted Temporary Recommendations under the International Health Regulations in January 2020.[89]

WHO recommendations may provide a benchmark for assessing whether measures are reasonable, because they are emanated by an international organization with wide membership. Nonetheless, states can still adopt more "ambitious measures adapted to national risks and capacities."[90] It is lawful for states to go beyond or adopt additional measures under the IHR. Although the IHR are legally binding, their main objective is to support governments in coping with, and promptly reporting, emerging international health risks.[91] As a broad framework for action, the IHR leaves open various questions of detail.

As such, several states have gone beyond the WHO Emergency Committee's Temporary Recommendations made under the International Health Regulations in January 2020. For instance, the recommendations "[did] not recommend any travel or trade restriction based on the current information available."[92] Nonetheless, "more than 80 governments have placed restrictions of some sort on the export of personal protective equipment and medication necessary to treat those affected by the virus."[93] In addition, some states have made the use of health masks compulsory in public despite the WHO's initial stance on the matter that only ill people and people assist-

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86. *Id*.

87. *Strengthening Health Security by Implementing the International Health Regulations* (2005), WORLD HEALTH ORG., https://www.who.int/ihr/procedures/pheic/en/ (last visited Dec. 26, 2020).

88. *Id*.

89. *Timeline of WHO's Response to COVID-19*, WORLD HEALTH ORG., https://www.who.int/news-room/detail/29-06-2020-covidtimeline (last visited Sept. 9, 2020).

90. Oliver Hailes, *Epidemic Sovereignty? Contesting Investment Treaty Claims Arising from Coronavirus Measures*, EJIL: TALK! (Mar. 27, 2020), https://www.ejiltalk.org/epidemic-sovereignty-contesting-investment-treaty-claims-arising-from-coronavirus-measures/.

91. Dye, *supra* note 81, at 2898.

92. *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV),* WORLD HEALTH ORG. (Jan. 30, 2020), https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

93. Siddharth S Aareya, *Are COVID-19 Related Trade Restrictions WTO-Consistent?,* EJIL: TALK! (Apr. 25, 2020), https://www.ejiltalk.org/are-covid-19-related-trade-restrictions-wto-consistent/.

ing them should wear face masks.[94] Nowadays, the WHO encourages the use of face masks more generally.[95] More stringent measures may be necessary, as scientists and policy makers are learning while they are trying to bring the pandemic under control. As the Director of the London School of Hygiene and Tropical Medicine, Peter Piot, pointed out, "the more we learn about the virus, the more questions arise."[96]

Local conditions matter in assessing whether given state measures comply with the fair and equitable treatment standard. For example, the Arbitral Tribunal in *Mamidoil v. Albania* held that the FET must be calibrated according to the circumstances of the host state by considering "the heritage of the past as well as the overwhelming necessities of the present and future."[97] Similarly, in *Philip Morris International (PMI) v. Uruguay*, the majority similarly held that the FET standard "d[oes] not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory."[98] Therefore, as the pandemic is spreading across the globe, it would be irrational to insist that states maintain the stability of their legal framework.

Accordingly, can a state's failure to take early or suitable measures to contain the spread of the virus violate the fair and equitable treatment standard "if such failure necessitated . . . drastic state measures at a later time period that harmed investments significantly"?[99] If a host state had adopted a modest virus response strategy which made its whole situation worse and this then impacted the investor negatively, could the investor argue that this is in breach of the FET standard, given that the host state failed to develop an effective virus response strategy? Assuming the investor suffers harm, could the state be held liable to the investor in some way for not having

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94. *Which Countries Have Made Wearing Face Masks Compulsory?* ALJAZEERA NEWS (Aug, 17, 2020), https://www.aljazeera.com/news/2020/8/17/which-countries-have-made-wearing-face-masks-compulsory (reporting that more than fifty countries require people to cover their faces when they leave home).

95. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (June 5, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—-5-june-2020 (Stating "Governments should encourage the general public to wear a fabric mask if there is widespread community transmission, and especially where physical distancing cannot be maintained. Why? Masks are a key tool in a comprehensive approach to the fight against COVID-19.")

96. Lisa O'Carroll, *'Finally a Virus Got Me': Ebola Expert on Nearly Dying of Coronavirus*, GUARDIAN (May 13, 2020), https://www.theguardian.com/global-development/2020/may/13/finally-virus-got-me-ebola-expert-on-nearly-dying-coronavirus-peter-piot.

97. Mamidoil Jetoil Greek Petroleum Prod. Soc. S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award ¶ 629 (Mar. 30, 2015), https://www.italaw.com/cases/3003.

98. Philip Morris Brands Sàrl. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 430 (2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.

99. Bento & Chen, *supra* note 49.

made better choices, especially if these were not in compliance with international standards as set by relevant international health bodies?

Foreign investors could, in theory, argue that state's non-compliance with the IHR contributed to the worsening of the pandemic and increased economic damage. However, due to the novelty of the coronavirus and the limited information available to governments in the early development of the pandemic, governments' actions varied widely across the globe.[100] Without full knowledge of the virus' features, symptoms, and modes of transmission—data that is continually being changed and refined—states' reactions were uneven and depended on different criteria, such as the diffusion of the virus, growing knowledge about the disease, emergency preparedness, and different cultural levels of risk aversion. The IHR does not include an enforcement mechanism for states which fail to comply with its provisions.[101] Instead, it relies on "peer pressure" and blame and shame mechanisms to induce state compliance.[102] If conflicts arise between states concerning the interpretation or application of the regulations, states can opt for negotiation, mediation, and conciliation.[103] They can also settle their disputes by referring them to the Director-General of the WHO or by arbitration.[104] Although the dispute settlement provisions of the IHR have not been invoked yet, there is a possibility that a commission of inquiry might be established.[105] However, as we have seen, the adoption of a modest response to the crisis should not be considered as faulty especially if the response was calibrated to the IHR and conformed with relevant international recommendations. If a state systematically ignored recommendations of the WHO and/or other public health experts, deliberately discriminating against and disrupting the business of given foreign investors, this could perhaps amount to a breach of the fair and equitable treatment standard.

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100. Cindy Cheng, Joan Barcelo, Allison Spencer Hartnett, Robert Kubinec & Luca Messerschmidt, *COVID-19 Government Response Event Dataset (CoronaNet v.1.0)*, 4 NATURE HUM. BEHAV. 756, 756 (2020).

101. Pedro Villareal, *COVID-19 Symposium: "Can They Really Do That?" States' Obligations Under the International Health Regulations in Light of COVID-19 (Part II)*, OPINIO JURIS (Mar. 31, 2020), http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-ii/.

102. *Frequently Asked Questions About the International Health Regulations (2005)*, WORLD HEALTH ORG., https://www.who.int/ihr/about/faq/en/ (last visited Dec. 26, 2020).

103. *Id*.

104. *Id.*

105. *See* Colum Lynch, *WHO Becomes Battleground as Trump Chooses Pandemic Confrontation over Cooperation*, FOREIGN POL'Y (Apr. 29, 2020), https://foreignpolicy.com/2020/04/29/world-health-organization-who-battleground-trump-taiwan-china/ (reporting that on April 29, the United States proposed to "immediately initiate an independent expert evaluation, in consultation with Member States, to review lessons learned from the WHO-coordinated international health response to COVID-19 . . . . The evaluation would address the adequacy of WHO and Member State actions . . . since the outbreak began; a full assessment of the timelines, accuracy, and information sharing aimed at containing the outbreak of the source.")

And even if one could consider a modest response to the crisis as faulty, past claims attempting to employ investment treaty provisions, such as FET, as a tool to enforce environmental obligations or indigenous peoples' rights have not been successful.[106] From a legal perspective, the Allard tribunal held that investment treaties are not intended to enforce non-investment-related matters and that they cannot bypass the will of states by expanding their jurisdiction over matters not governed by the applicable treaty.[107] Only "acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" could give rise to state liability.[108] Therefore, it is doubtful that investors could successfully claim that state's non-compliance with the IHR amounts to a breach of the fair and equitable treatment standard unless there was deliberate intent to affect foreign investors and their business.

B. *Non-Discrimination*

Investment treaties generally prohibit discrimination against foreign investors and their investments and include provisions on national treatment and most-favored-nation treatment.[109] The national treatment standard requires the host state not to provide less favorable treatment, either de facto or de jure, to foreign investors compared to domestic investors in similar situations.[110] Meanwhile, the most favored nation treatment prohibits the host state from providing less favorable treatment to foreign investors compared to other investors of a different nationality.[111]

Investors may claim that the given measures were designed or implemented in such a way that discriminates against them. If emergency measures seek to bolster national productivity and support domestic industries, investors may contend that such actions constitute a breach of the national treatment standard. In addition, border closures may affect foreign businesses more than similar domestic enterprises, resulting in indirect discrimination.

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106. *See*, *e.g.*, Grand River Enters. Six Nations, Ltd. v. U.S., ICSID Case No. ARB(AF)/12/1, Award, ¶¶ 175, 197 (Jan. 11, 2011), https://www.italaw.com/cases/510; Allard v. Gov't of Barb., Case No. 2012-06, Award, ¶¶ 51, 228 (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/112/.

107. *See*, *e.g.*, Allard v. Gov't of Barb., Case No. 2012-06, Award, ¶182 (Perm. Ct. Arb. 2016), https://pca-cpa.org/en/cases/112/.

108. Alex Genin, E. Credit Ltd., Inc. v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001), https://www.italaw.com/cases/484.

109. Nicholas Di Mascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 48 n.3 (2008).

110. U.N. Conf. on Trade & Dev., *National Treatment*, U.N. Doc. UNCTAD/ITE/IIT/11 (Vol. IV), 40 (1999).

111. Org. for Econ. Co-operation & Dev., *Most-Favoured-Nation Treatment in International Investment Law* 2, (Org. for Econ. Co-operation & Dev. Working Papers on International Investment 2004/02, 2004).

Nonetheless, some regulatory distinctions may be upheld if they pursue legitimate public interests, are taken in good faith, and are reasonably tailored to achieve such interests.[112] Closing borders and restricting freedom of movement, for example, may be justified by the need to prevent the spread of disease at home and overseas, and may be objectively grounded in the need to save lives. As a highly reputed scholar pointed out, "Article 43 of the IHR clearly leaves room for action going beyond that recommended by the WHO, consistent with respect for States' sovereign rights (IHR art. 3.4), in appropriate circumstances."[113] Protecting public health is a legitimate objective that can empower states to restrict economic freedoms in line with most constitutions and international instruments.[114] Moreover, indirect discrimination is difficult to prove, especially when measures have regulated entire economic sectors.[115]

There may, however, be cases in which state authorities have adopted specific measures targeting the operations of certain companies under the pretext of the ongoing crisis. If public health were used simply as a pretext for other motives, as would hypothetically be the case if a state permanently nationalized airlines, utilities companies, or natural resources industries unrelated to the crisis,[116] then investor-state arbitration could be a tool to ensure access to justice to affected investors. In other words, "not only the effects of the measures, but also the aims would be relevant in order to find discrimination."[117] In certain cases, the existence of good faith and legitimate regulatory purposes "would dispense with the necessity to invoke exceptions."[118] In conclusion, arbitral tribunals must necessarily adopt a case-by-case approach.[119]

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112. *See, e.g.,* Parkerings-Compagniet AS v. Rep. of Lith., ICSID Case No. ARB/05/8, Award, ¶ 345 (Sept. 11, 2007), https://www.italaw.com/cases/812.

113. Caroline Foster, *Justified Border Closures Do Not Violate the International Health Regulations 2005*, EJIL: TALK! (June 11, 2020), https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/.

114. *See* Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Product*s, ¶ 168, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

115. *See* Methanex Corp. v. U.S., UNCITRAL, Award, ¶ 18 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf.

116. Bento & Chen, *supra* note 49, at 3.

117. Anne van Aaken, *International Investment Law Between Commitment and Flexibility*, 12 J. INT'L ECON. L. 507, 531 (2009).

118. *Id.*

119. *Cf.* Nicolas Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 INT'L & COMP. L.Q. 831, 831, 861 (2011) (arguing that in ascertaining discrimination, arbitral tribunals should "weigh and balance" "a range of factors").

C. *Expropriation*

Expropriation constitutes a central notion in every international investment treaty, but it lacks a uniform definition.[120] The Oxford English Dictionary defines expropriation as a taking of property from its owner for public use or benefit. It comes from medieval Latin '*expropriare*' meaning to take from the owner (*ex* = from and *proprium* = one's own).[121] The right to expropriate inheres in every state.[122] It is recognized under national and international law.[123] Expropriation rules govern the clash between private property and the state authority to take measures for the commonweal.

The concept of expropriation is broadly construed in investment treaties to not only protect foreign assets from the direct and full taking of property, but also from de facto or indirect expropriation.[124] Direct expropriation implies the transfer of the legal title from the owner to the state.[125] It constitutes a deprivation of foreign investors' ownership and appropriation of those rights by the state.[126] Indirect expropriation, on the other hand, indicates a government measure that, while not on its face expropriatory, results in the deprivation of foreign investors' property. Treaty provisions generally lack a precise definition of indirect expropriation, and their language encompasses a wide variety of state activities that may interfere with investor property. Indirect expropriations also interfere in the use of property even where the property is not seized, and the legal title of the property is not affected. For instance, the host state may target a foreign investor by imposing very high taxes or regulatory requirements that make the foreign investment economically unviable.[127] Other examples of indirect expropriation include the repudiation of concession agreements, denial of permits necessary to operate a concession, and the freezing of investor's accounts.[128] Substantial deprivation of an asset is the international law threshold for the existence of

120. U.N. Conf. on Trade & Dev., *Expropriation: A Sequel*, U.N. Doc. UCTAD/DIAE /IA/2011/7 (Vol. II), xi (2012).

121. Emmis Int'l Holding v. Hung., ICSID Case No. ARB/12/2, Award, ¶ 159 (Apr. 16, 2014), https://www.italaw.com/cases/384.

122. U.N. Conf. on Trade & Dev., *supra* note 120, at 1 (noting that "States have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons.").

123. *See id.*

124. *Id.* at xi.

125. *Id.*

126. *See, e.g.,* Compañia del Desarrollo de Santa Elena S.A. v. Rep. of Costa Rica, ICSID Case No. ARB/96/1, Award, (Feb. 17, 2000), https://www.italaw.com/sites/default /files/case-documents/italaw6340.pdf.

127. *See generally* Ali Lazem & Ilias Bantekas, *The Treatment of Tax as Expropriation in International Investor–State Arbitration*, ARB. INT'L, 2015, at 1.

128. *See, e.g.,* Yukos Universal Ltd. (Isle of Man) v. Russ. Fed'n, PCA Case No. 2005-04/AA227, Final Award, ¶ 63 (Perm. Ct. Arb. 2014), https://pcacases.com/web/sendAttach /420.

indirect expropriation.[129] Only state activity that wholly or substantially deprives investors of the enjoyment of their rights amounts to expropriation.[130]

Direct expropriations are lawful if a state pursues a public interest, follows due process, and provides adequate compensation in a non-discriminatory manner.[131] Ascertaining whether a direct expropriation is lawful is relatively straightforward. For instance, Swiss legislation enabling the Federal Council to order both the mandatory production and the confiscation of public health-related goods while providing a cost-covering compensation, was considered a lawful expropriation.[132] It certainly pursued a public interest, and it followed due process as it was adopted by an act of Parliament. It provided compensation and was non-discriminatory. Nonetheless, while direct and overt expropriations are now rare, indirect expropriation has become the typical form in which expropriations take place today.[133]

With regard to indirect expropriation, the distinction between simple regulatory measures and those that amount to indirect expropriation is crucial.[134] However, the boundaries are blurred.[135] For instance, a debate has arisen as to whether compulsory licenses constitute indirect expropriation. As is known, under a compulsory license, a company seeking to use another's intellectual property can do so without the right holder's consent, albeit paying them a determined fee for such use.[136] As I argued elsewhere, non-voluntary licenses do not amount to expropriation, as they provide compensation and are a specific intellectual property tool that states have used for centuries to address health emergencies.[137] In this regard, Israel's issuance of a non-voluntary license allowing the importation of an antiviral treatment

129. U.N. Conf. on Trade & Dev., *supra* note 120, at 64 (noting that "In the majority of cases to date, claims of indirect expropriation have been dismissed because the negative impact of the measure did not rise to the level of a taking.")

130. *See* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 357 (2009) (noting that "[A]lthough regulatory measures designed to protect the environment, health and safety or ensure fair competition frequently impose regulatory and compliance costs on an investment, these will not normally reach the threshold of a substantial deprivation").

131. U.N. Conf. on Trade & Dev., *supra* note 120, at 12.

132. Recueil officiel du droit federal [RO] [Official Compilation of Federal Law] Mar. 13, 2020, RS 818.101.24 (Switz.).

133. U.N. Conf. on Trade & Dev., *supra* note 120, at 1–2.

134. *Id.* at 12–13 ("In some instances, an act or measure of the State taken in the exercise of the State's police powers or its right to regulate in the public interest can lead to a significant impairment of businesses. The question then arises how to distinguish between an expropriatory measure and a normal (and thus non-compensable) regulatory act of State.").

135. *See id.* at 13–14.

136. Valentina Vadi, *Towards a New Dialectics—Pharmaceutical Patents, Public Health and Foreign Direct Investments*, 5 N.Y.U. J. INTELL. PROP. & ENT. L.113, 157 (2015).

137. *See* VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 76–80 (2012).

protected by patents, for example, should not be seen as an unlawful indirect expropriation, but as a legitimate exercise of state sovereignty to make full use of the flexibilities included in its intellectual property legal framework.[138]

Other claims may arise if states deny the patentability of formulae in relation to the new medical use of existing medicines. For example, medicines used for the treatment of rheumatoid arthritis have been repurposed to treat COVID-19.[139] Similarly, scientists "found that steroids were linked with a one-third reduction in deaths among critically ill Covid-19 patients."[140] While "claims on the second medical use of medicines are allowed in many countries that interpret patentability criteria expansively,"[141] such evergreening of patents—that is, obtaining new patents for the same formula because of its new medical uses, thus ultimately preventing competition and the lowering of the product price—is not required under international law.[142] Rather, arguments are made that evergreening claims "fail to comply with the requirements of novelty and industrial applicability,"[143] thus being in breach of article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[144] Accordingly, denying such evergreening of patents should not be viewed as an indirect expropriation, but as a legitimate exercise of states' regulatory powers.[145]

It is also of note that in the growing tide of arbitral jurisprudence, two streams have emerged concerning expropriation: the sole-effects doctrine and the police powers doctrine. While the former focuses on the effects of

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138. *See* Ministry of Health Permit (Isrl.), A Permit to the State to Exploit an Invention Pursuant to Chapter Six, Article Three of the Patents Law 5727-1967 (Mar. 18, 2020), https://www.keionline.org/wp-content/uploads/A-Permit-to-the-State-to-Exploit-an-Invention-Pursuant-to-Chapter-Six-Article-Three-of-the-Patents-Law-5727-1967.pdf.

139. Viviana Muñoz Tellez, *The COVID-19 Pandemic: R&D and Intellectual Property Management for Access to Diagnostics, Medicines and Vaccines* 4 (South Centre Policy Brief No. 73, 2020), https://ssrn.com/abstract=3640229.

140. Roni Caryn Rabin, *Steroids Can Be Lifesaving for Covid-19 Patients, Scientists Report*, N.Y. TIMES (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/health/coronavirus-steroids.html.

141. Muñoz Tellez, *supra* note 139, at 4.

142. *See generally* Michelangelo Temmerman, *The Legal Notion of Abuse of Patent Rights* (Swiss Nat'l Ctr. Competence Rsch. Working Paper No. 2011/23, 2011) (considering whether evergreening can be considered to be an abuse of patent rights).

143. Muñoz Tellez, *supra* note 139, at 4.

144. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement]. ("Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.")

145. *See generally* Vadi, *supra* note 136, at 156–65; Valentina Vadi, *Investment Disputes, Pharmaceutical Patents and Health-Related Goods*, *in* THE NEW INTELLECTUAL PROPERTY OF HEALTH — BEYOND PLAIN PACKAGING (Alberto Alemanno & Enrico Bonadio eds., 2016).

the state measure on foreign property, and thus, favors the investor's perspective, the latter focuses on the alleged goal of the state measure. According to the sole effects doctrine, which focuses on the negative impact of regulation on foreign investment, compensation must be paid whenever the foreign investment is economically affected by a regulation.[146] The objective of the government is irrelevant; the intent to expropriate is not a necessary element of state responsibility.[147] According to the police powers doctrine, however, general regulation adopted bona fide and in a non-discriminatory manner to protect public health cannot be compensated.[148] Both doctrines have generated significant jurisprudence.

Several characteristics can indicate that a measure at stake constitutes an indirect expropriation. If a state adopts a general regulation that *de facto* targets a foreign investor or only applies to foreign investments, such discrimination may constitute evidence that there is indirect expropriation that can be compensated. Furthermore, a significant interference or economic damage to the foreign investor may also constitute evidence of expropriation.[149]

If, however, the general regulation targeting the protection of public health affects both citizens and foreign companies, has a legitimate objective, and does not involve the acquisition or transfer of property from the investor to the state, then it may be deemed a legitimate exercise of the police powers of the state.[150] Barnali Choudhury considers the police powers doctrine to be a justification of state conduct that would otherwise lead to compensation.[151] Other scholars, such as Santiago Montt, Valentina Vadi, Howard Mann, and Konrad Von Moltke regard it to be a legitimate exercise of state sovereignty and the state's right or duty to protect public health.[152]

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146. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 20, 2000), 40 I.L.M. 36 ("expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.").

147. *Id.* ¶ 111.

148. Org. for Econ. Co-operation & Dev., *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 18–19 (Org. for Econ. Co-operation & Dev. Working Papers on International Investment 2004/02, 2004).

149. U.N. Conf. on Trade & Dev., *supra* note 120, at 64.

150. VADI, *supra* note 137, at 139.

151. Barnali Choudhuri, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to Democratic Deficit*?, 41 VAND. J. TRANSNAT'L L. 775, 794 (2008) (considering the police powers doctrine as an exception).

152. VADI, *supra* note 137, at 140; SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 192–93 (2012); HOWARD MANN & KONRAD VON MOLTKE, PROTECTING INVESTOR RIGHTS AND THE PUBLIC GOOD: ASSESSING NAFTA'S CHAPTER 11 at 15 (2003).

Given this, investors may argue that business closures, curfews, and the creation of sanitary cordons—isolated geographic zones with bars on entry and exit—amount to an indirect expropriation of their business. Such measures may have had a particularly negative impact on economic sectors that depend on free movement. As noted above, companies may alternatively contend that compulsory licenses—permission to use proprietary technology to treat patients or develop vaccines or therapies—amount to indirect expropriation.[153] They may also argue that state orders confiscating personal protective equipment or requiring companies to produce goods, such as masks, gloves, gowns, and ventilators, amounts to expropriation. Meanwhile, many foreign investors have likely been impacted by state restrictions on the export of pharmaceutical ingredients. Some states have even empowered the government to temporarily take control of industries, factories, and private hospitals in order to ensure the supply of goods and services necessary for the protection of public health.[154] An investor could claim that such temporary control over its factory constitutes an indirect expropriation if the requisition lasts for a sufficiently long period of time without adequate compensation, or if the state does not return control after the end of the pandemic.[155]

IV. POTENTIAL STATE RESPONSES

This part investigates the argumentative patterns that states may use in investor-state arbitrations related to a pandemic situation. States may raise several legal arguments and defenses in investor-state arbitrations arising in the aftermath of the coronavirus crisis. Arbitral tribunals have previously addressed a range of public health-related disputes, including those related to environmental health, pharmaceutical patents, and tobacco control.[156]

153. VADI, *supra* note 137, at 76.

154. Hailes, *supra* note 90, at 1.

155. Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶ 107 (Apr. 12, 2002), 7 ICSID Rep. 173 (2005) (finding the suspension of an export license for four months amounted to indirect expropriation and that, more generally "[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or . . . as measures the effect of which is tantamount to expropriation."); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award,¶ 97 (Dec. 8, 2000), 6 ISCID Rep. 67 (2004) (holding that investor's loss of control of property for one year amounted to indirect expropriation as "it is generally accepted in international law, that a case of expropriation exists not only when a state takes over private property, but also when the expropriating state transfers ownership to another legal or natural person.").

156. *See generally* VADI, *supra* note 137; Valentina Vadi, *The Environmental Health Spillovers of Foreign Direct Investment in International Investment Arbitration*, *in* ENVIRONMENTAL HEALTH IN INTERNATIONAL AND EU LAW: CURRENT CHALLENGES AND LEGAL RESPONSES 43 (Stefania Negri ed., 2019); Valentina Vadi, *Energy Security v. Public*

Nonetheless, the current pandemic "is qualitatively different" because of its "pervasive and simultaneous impacts on human rights, economic interests, and national security."[157] Arbitral tribunals have been traditionally reluctant to weigh human rights and security considerations in the adjudication of investment disputes, focusing instead on the economic dimension of such disputes.[158] The coronavirus pandemic now challenges this traditional interpretive stance, as it requires the full use of the legal mechanisms that international law offers.

A. *Police Powers*

The protection of public health is not only a fundamental state interest but also a fundamental duty derived from both human rights law and the social compact between a state and its citizens.[159] The population of a country constitutes a component part of the state, together with territory and government, and also its *raison d'être*.[160] The protection of its population is thereby a paramount interest.[161] Following this reasoning, public health measures adopted to fight the coronavirus pandemic fall under state police powers—the plenary authority to provide for the well-being of state citizens. Thus, the measures adopted to fight the coronavirus may not constitute expropriation in the first place.[162]

Pandemics have variously shaped laws for centuries.[163] From the beginnings of human civilization, public authorities have often taken measures to prevent the

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Health? Nuclear Energy in International Investment Law and Arbitration, 47 GEO. J. INT'L L. 1069 (2016); Valentina Vadi, *Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law*, 48 STAN. J. INT'L L. 93 (2012).

157. Nicholas J. Diamond, *Pandemics, Emergency Measures, and ISDS*, KLUWER ARB. BLOG (Apr. 13, 2020), http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measures-and-isds.

158. *See*, *e.g.*, *infra* Section IV.B (discussing the cases concerning Argentina's financial crisis).

159. VADI, *supra* note 137, at 28.

160. *Id.* at 30.

161. *Id.*

162. *See also supra* Section III.C.

163. *See generally*, *e.g.*, Mitra Sharafi, *Pandemic or Poison? How Epidemics Shaped South Asia's Legal History*, HIMAL S. ASIAN (Apr. 20, 2020), https://www.himalmag.com/pandemic-or-poison-2020/; CARLO M. CIPOLLA, FAITH, REASON, AND THE PLAGUE (Muriel Kittle trans., 1981) (detailing the outbreak of plague in seventeenth-century Tuscany, and the subsequent lockdowns and quarantines); CARLO M. CIPOLLA, PUBLIC HEALTH AND THE MEDICAL PROFESSION IN THE RENAISSANCE (1973); JOHN HENDERSON, FLORENCE UNDER SIEGE: SURVIVING PLAGUE IN AN EARLY MODERN CITY (2019) (examining how seventeenth-century Florence confronted, suffered, and survived a major epidemic of plague and showing how the public health governance methods developed by the Italian city-states spread across the world); SUSAN MOSHER STUARD, A STATE OF DEFERENCE, RAGUSA/DUBROVNIK IN THE MEDIEVAL CENTURIES (2016) (detailing how the Ragusan council introduced a thirty-two-day forced isolation period and later forbade the import of wheat, fruit and cloth from locations known to harbor the plague).

spread of diseases.[164] Quarantine, which is compulsory isolation to contain the spread of disease, represents one of the most ancient regulations concerning public health.[165] The 643 Edict of Rothari (606-652), devoted a chapter to the treatment of lepers and provided for the *Separatio Leprosorum*, a practice which would keep the ill separate from the community in order to limit the spread of the disease.[166]

During the fourteenth century Black Death in Europe, as a measure of disease prevention related to the plague, ships and people had to spend forty days in isolation prior to entering Venetian ports.[167] Vessels were also ordered to be burned with their cargo if infection was suspected.[168] Modern public health measures were later systematically adopted in the mid-nineteenth century in several countries as part of both social reform movements and the growth of biological and medical knowledge.[169] Major European states concluded that the international spread of infectious diseases could no longer be handled as a matter only of national governance; the nature of the problem—diseases spreading across borders through international trade and travel—demanded international cooperation.[170] Therefore, several international conferences were held to unite action in preventing the spread of cholera and other diseases.[171] In the United States, general quarantine measures were adopted during the Spanish flu pandemic a century ago.[172] More recently, specific quarantine measures were adopted with regard to travelers coming from pandemic-affected countries.[173] African and Asian states have similarly adopted measures to fight the spread of Ebola, Zika, and Severe Acute Respiratory Syndrome.[174] States have adopted a range of measures to fight pandemics for centuries.[175] Thus, for centuries, pandemics have tested the boundaries between the protection of individual freedoms and the safeguarding of the common good.

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164. VADI, *supra* note 137, at 26–27.

165. *Id.* at 26.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 26–27.

170. *Id.* at 26.

171. *Id.* at 27.

172. *See* Howard Markel, Harvey B. Lipman, J. Alexander Navarro, Alexandra Sloan, Joseph R. Michalsen, Alexandra Minna Stern & Martin S. Cetron, *Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic*, 6 J. AM. MED. ASS'N 644, 644–45 (2007).

173. MICAELA DEL MONTE, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, US FEDERAL AND STATE TRAVEL LIMITS AND QUARANTINE MEASURES (2020).

174. Dep't Glob. Commc'ns, *Learning from the Past: UN Draws Lessons from Ebola, Other Crises to Fight COVID-19,* UNITED NATIONS (May 13, 2020), https://www.un.org/en/coronavirus/learning-past-un-draws-lessons-ebola-other-crises-fight-covid-19.

175. *See* VADI, *supra* note 137, at 26–27.

Many public health measures reflect the legitimate exercise of regulatory powers for public welfare and express "the classic function of government to limit the transmission of infectious diseases."[176] As noted by a public health expert, public health measures can be broad and invasive, but rest on a solid legal basis "that recognizes the unique capacity of government . . . to play a coordinating role in times when individual actions pose society-wide risks" and collective action is needed.[177] In other words, "where there is a visceral threat to society as a whole, governments have wide latitude to protect the population."[178]

States have broad regulatory autonomy, including the "police powers" to adopt measures to protect public health under customary international law.[179] The term "police" may seem misleading to contemporary readers and the overall expression "police powers" lacks a clear definition. In his 1793 *Lectures on Justice, Police, Revenues, and Arms*, Adam Smith noted that "police" derives from the Greek *politeia* (polity).[180] Police powers indicate the exercise of state policy or the adoption of regulation that aims at preventing nuisance and protecting public health that may encroach on individual economic interests.[181] Police powers indicate the power of the state to restrain property rights of persons for the protection of essential public interests such as public order, public health and security, and preventing harm/nuisance.[182] Not only domestic law, but also international law has traditionally attached "normative priority to sovereign regulation in an epidemic,"[183] as such measures "have been a core expression of police power."[184]

The police powers doctrine exempts from liability only reasonable, good faith, and non-discriminatory exercise of such powers.[185] However, the legal status of the police powers doctrine has long been uncertain.[186] Some argue that it belongs to customary international law or that it constitutes a general principle of international law.[187] It certainly constitutes more than a mere interpretive tool, as shown by jurisprudential developments.[188]

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176. Kristen Underhill, *Public Health Law Tools: A Brief Guide*, *in* LAW IN THE TIME OF COVID-19 59, 59 (Katharina Pistor ed., 2020) ("for any given individual, the costs of protective measures . . . may be greater than the risks posed by continuing ordinary life. But for the population as a whole, continuing life as usual will result in a large number of deaths.").

177. *Id.* at 60.

178. *Id.*

179. Diamond, *supra* note 157.

180. ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 154 (1763).

181. VADI, *supra* note 137, at 139–40.

182. *Id.*

183. Hailes, *supra* note 90, at 4.

184. *Id.*

185. *See*, *e.g.*, VADI, *supra* note 137, at141.

186. *Id.*

187. *See*, *e.g.*, Saluka Inv. B.V. v. Czech, Partial Award, ¶ 262 (Perm Ct. Arb., 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf ("in the opinion of the

As early as 1903, the umpire in the *Bischoff* case, in dismissing a claim for damages, held that "[c]ertainly during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers."[189] In this case, the police had taken a carriage belonging to the claimant in Caracas, Venezuela in August 1898 during an epidemic of smallpox. The police received information that the carriage had carried two persons afflicted with the disease, and the police kept it in custody for a considerable time. The umpire concluded that the police measure had been lawful, and that the damage to the owner's business was "not legally recoverable."[190]

More recently, in *PMI v. Uruguay*, the Arbitral Tribunal recognized that "[p]rotecting public health has long been recognized as an essential manifestation of the State's police power" and thus held that tobacco control measures did constitute an expropriation.[191] Even more importantly, the Tribunal acknowledged that police power is an "accepted principle of customary international law."[192] The Tribunal in *Saluka Investments B.V. v. Czech Republic* similarly held that: "[T]he principle that a State . . .adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today."[193]

Arbitral tribunals can apply customary international law if the applicable law is international law. They can also interpret the expropriation provision of the applicable treaty in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties.[194] This article requires that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes . . . customary international law."[195] Some states have explicitly in-

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Tribunal, the principle that a state does not commit an expropriation and is thus not liable to pay compensation to a dispossessed foreign investor when it adopts general regulations that are commonly accepted within the police powers of the states forms part of customary international law today."); Chemtura Corp. v. Gov't of Can., Award, 30–31 (Ad Hoc NAFTA Arb., 2010), https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.

188. Philip Morris Brands Sàrl. v. Oriental Republic of Uru., ICSID Case No. ARB/10 /7, Award, ¶ 291 (July 8, 2016), https://www.italaw.com/sites/default/files/case-documents /italaw7417.pdf.

189. Bischoff Case, 10 R.I.A.A. 420, 420–21 (1903).

190. *Id.* at 420.

191. Philip Morris Brands Sàrl. v. Oriental Republic of Uru., ICSID Case No. ARB/10 /7, Award, ¶ 291 (2016), https://www.italaw.com/sites/default/files/case-documents /italaw7417.pdf.

192. *Id.* ¶ 294.

193. Saluka Inv. B.V. v. Czech, Partial Award, ¶ 262 (Perm. Ct. Arb., 2006), https: //www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

194. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

195. Philip Morris Brands Sàrl. v. Oriental Republic of Uru., ICSID Case No. ARB/10 /7, Award, ¶ 291 (2016), https://www.italaw.com/sites/default/files/case-documents /italaw7417.pdf.

cluded reference to their police powers in their treaties and arbitral tribunals have increasingly tended to apply it.[196]

According to the police powers principle, "where economic injury results from a *bona fide* non-discriminatory regulation within the police power of the state, compensation is not required."[197] In *PMI v. Uruguay*, the Tribunal concluded that the legitimate exercise of the state's police powers does not amount to an expropriation and does not require compensation.[198] The *Saluka* Tribunal also held that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their police powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.[199] Furthermore, the Tribunal in *Methanex Corp. v. U.S.* similarly stated that: "[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory."[200] Finally, the Tribunal in *Telenor Mobile Communications A.S. v. Hungary* confirmed this line of reasoning by stating that "it is well established that the mere exercise by government of regulatory powers that create impediments to business or entail the payment of taxes or other levies does not of itself constitute expropriation."[201]

The response to the coronavirus pandemic has logically differed across the globe because the pandemic has affected states in different ways and at different times. Moreover, national responses to epidemics are "inherently political."[202] "The experts selected for consultation, the evidence used to inform response pathways, and narratives . . . are politically driven,"[203] and public health choices often reflect the fundamental cultural choices and val-

196. *See, e.g.,* Investment Agreement for the Common Investment Area art. 20.8, May 23, 2007, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf ("Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.").

197. Philip Morris Brands Sàrl. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 294 (2016), https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.

198. *Id.* ¶ 307.

199. Saluka Inv. B.V. v. Czech, Partial Award, ¶ 262 (Perm. Ct. Arb. 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

200. *See* Methanex Corp. v. U.S., UNCITRAL, Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf.

201. Telenor Mobile Commc'ns A.S. v. Republic of Hung., ICSID Case No. ARB/04/15, Award, ¶ 64 (Sept. 13, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf.

202. *See* Lydia Kapiriri & Alison Ross, *The Politics of Disease Epidemics: A Comparative Analysis of the SARS, Zika, and Ebola Outbreaks,* 7 GLOB. SOC. WELFARE 33, 33 (2018).

203. *Id.*

ues of given countries.[204] Public health policies are also cultural choices as they are based on "shared conventional beliefs, practices and values."[205] For this reason, they dramatically vary in the duration and generality of measures, enforcement penalties, and application to individuals and/or communities. Although public health measures, such as quarantines and lockdowns, can interfere with many rights, including economic freedoms, domestic courts "usually find that states' interest in public health outweighs these freedoms . . . as long as they are reasonable in relation to the threat to public health."[206]

International courts and tribunals have upheld state actions that are reasonable, adopted in good faith, and non-discriminatory.[207] Where there is a serious public health threat, courts and arbitral tribunals should not second guess public health measures adopted in response to global pandemics. Instead, they should check the reasonableness of the adopted measures, considering that "the state's interest in public health tends to outweigh individual freedoms."[208] That the coronavirus is a severe public health threat is uncontroversial. Accordingly, international courts and tribunals need only verify that state measures are not merely a pretext for discriminating against foreign investors. For state measures to stand arbitral scrutiny, authorities must adopt reasonable actions, and procedural due process is needed.

B. *Treaty Exceptions*

International investment law includes a number of treaty-based safety valves that exempt the parties from their respective obligations in specific situations. These flexibilities not only align with the basic pillars of international law but also strengthen the stability of the respective treaty systems. Considerations of justice, the perceived legitimacy and long-term viability of the treaty, and the maintenance of peace and security also matter.

While in early investment treaties, exceptions were generally few and far between, recent treaties increasingly reaffirm the state's right to regulate in the public interest by introducing general exceptions and/or clarifications

204. *See generally* A. DAVID NAPIER, MICHAEL DEPLEDGE, MICHAEL KNIPPER, REBECCA LOVELL, EDOUARD PONARIN, EMILIA SANABRIA & FELICITY THOMAS, WORLD HEALTH ORGANIZATION REGIONAL OFFICE FOR EUROPE, CULTURE MATTERS: USING A CULTURAL CONTEXTS OF HEALTH APPROACH TO ENHANCE POLICY-MAKING vii (2017), https://www.euro.who.int/__data/assets/pdf_file/0009/334269/14780_World-Health-Organisation_Context-of-Health_TEXT-AW-WEB.pdf (highlighting that "shared conventional beliefs, practices and values can have profound impacts on health and well-being").

205. *Id.*

206. Underhill, *supra* note 176, at 64.

207. *See*, *e.g.*, Chemtura Corp. v. Gov't of Can., Award, 30–31 (Ad Hoc NAFTA Arb., 2010), https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.2.

208. Underhill, *supra* note 176, at 64.

as to the meaning of standards of protection.[209] Exceptions to the standards of protections enable states to adopt measures otherwise prohibited by the international investment agreement to pursue specific policy objectives.[210] Clarifications, on the other hand, detail the content of vague investment treaty provisions such as the prohibition of unlawful expropriation. For instance, the Canada–E.U. Free Trade Agreement includes provisions clarifying that regulatory measures adopted to protect public health do not constitute a breach of investment provisions.[211] Other treaties governing foreign direct investment include a comprehensive general exception clause enabling the parties to adopt measures to protect human life and public health provided that they are not arbitrary or discriminatory.[212] Such general exception clause is often modeled after the General Agreement on Tariffs and Trade ("GATT"). As is known, the GATT includes a general exceptions' provision, article XX, which enables states to adopt measures that are "necessary to protect human, animal or plant life or health," provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Finally, some treaties exempt measures pursuing legitimate public health objectives from arbitration claims.[213] Such exceptions can make international investment treaties more flexible. However, as Newcombe cautioned, "the ap-

209. Andrew Newcombe, *General Exceptions in International Investment Agreements* 2 (BIICL Eighth Ann. WTO Conf., Draft Discussion Paper, 2008), https://www.biicl.org/files/3866_andrew_newcombe.pdf (noting that "states, including the US, Canada and Norway, have developed new model IIAs that clarify the meaning and scope of investment obligations in much greater detail. While the typical BIT runs 8-10 pages, these new models run over 50 pages.").

210. U.N. Conf. on Trade & Dev., *Investment Policy Responses to the COVID-19 Pandemic*, INV. POL'Y MONITOR (SPECIAL ISSUE), May 2020, at 14.

211. EU-Canada Comprehensive Economic and Trade Agreement art. 8.9, E.U.-Can., Oct. 20, 2016 (stating that "the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.").

212. Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, Nov. 14, 2006, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/626/download ("Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health. . .").

213. Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China art. 9.11.4, Austl.-China June 17, 2015, https://www.dfat.gov.au/sites/default/files/chafta-agreement-text.pdf [hereinafter ChAFTA]).

proach in IIA jurisprudence has been to construe express exceptions and defenses narrowly."[214]

A small number of international investment treaties include a national security exception or "non-precluded measures" clauses.[215] The term "non-precluded measures" is due to the typical formulation of security exceptions. For instance, a paradigmatic example of such exception states: "the present treaty shall *not preclude* the application of *measures*. . . necessary . . . for the maintenance or restoration of international peace and security . . ." (emphasis added).[216] The concept of national security is an evolving one,[217] which can cover measures to protect a state's essential security interests and to address serious threats to international peace and security, economic crisis, terrorism, public health emergencies, or natural disasters.[218] While the content and shape of such clauses vary widely,[219] they generally refer to security and public order.[220]

The coronavirus crisis has consolidated an expansion of the notion of national security.[221] In addressing the U.N. Security Council, the United Nations Secretary-General, António Guterres, stated that "the COVID-19 pandemic is profoundly affecting peace and security across the globe."[222] On July 1,2020, the U.N. Security Council unanimously adopted Resolution

214. Newcombe, *supra* note 209, at 6.

215. *See* Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., art. XX(1), Aug. 15, 1955, 8 U.S.T. 899; *see also* General Agreement on Tariffs and Trade 1994 art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994];). ChAFTA, *supra* note 213, art. 16.3 (incorporating article XXI of GATT 1994 and article XIV *bis* of GATS into the Agreement, *mutatis mutandis*); United States-Mexico-Canada Agreement art. 32.2(b), Nov. 3, 2018, Off. U.S. Trade Rep., Exec. Office of the President (providing a security exception that applies to the whole treaty by stating, "nothing in this Agreement shall be construed to: . . . (b) preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.").

216. *See* The Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., art. XX(1), Aug. 15, 1955, 8 U.S.T. 899.

217. *See generally* Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020).

218. Anne van Aaken, *International Investment Law Between Commitment and Flexibility: The Making of the GATT Security Exceptions*, 12 J. INT'L ECON. L 507, 523 (2020).

219. *See, e.g.,* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993) (stating that measures that are necessary for the maintenance of public order or the protection of essential security interests are not precluded under the BIT) [hereinafter Arg.-U.S. BIT].

220. *Id.*

221. Samantha Power, *How the COVID-19 Era Will Change National Security Forever*, TIME (Apr. 11, 2020, 5:37 PM), https://time.com/5820625/national-security-coronavirus-samantha-power/ (noting that COVID 19 has spurred "a redefinition of national security").

222. Press Release, Security Council, COVID-19 'Profoundly Affecting Peace across the Globe', Says Secretary-General, in Address to Security Council, U.N. Press Release SC /14241 (July 2, 2020).

2532.[223] Acknowledging that "the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security," the Security Council "demand[ed] a general and immediate cessation of hostilities in all situations on its agenda."[224] This is not unprecedented: already in 2014 the U.N. Security Council considered Ebola a "threat to international peace and security."[225] More generally, as states' vital interests are at stake, "the concept of national security expands to encompass issues such as . . . responses to pandemic disease."[226]

Questions still remain, however, as to who should judge the necessity of the adopted measures. Some clauses are explicitly self-judging, recognizing the parties' authority to implement measures "which [they] conside[r] necessary for the protection of [their]essential security interests."[227] For example, article 31 of the TRIPS Agreement concerning compulsory licensing and the Doha Declaration on the TRIPS Agreement and Public Health both enable states to define what constitutes a national emergency.[228] Therefore, it is up to states to define their essential security interests independently of the eventual existence of an international consensus on the matter. While no country would be expected to protect foreign investments when doing so could jeopardize its security interests, and states hold primacy in defining their own security interests, they should not abuse the security exception to accomplish protectionist, industrial, or ulterior geopolitical motives.[229]

Other clauses are not explicitly self-judging. Some scholars argue that if the state security exception were self-judging, then the exception would be unchecked and could be abused by states to enforce disguised protectionist regulations.[230] They contend that arbitral tribunals should weigh and balance the protection of foreign investments and national security interests.[231] Arbitral tribunals' approaches have oscillated between good faith scrutiny and full scrutiny in interpreting non-precluded measures clauses[232] unless the

223. S.C. Res. 2532 (July 1, 2020).

224. *Id.*

225. S.C. Res. 2177 (Sept. 18, 2004).

226. J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT'L L. 223, 223 (2020).

227. GATT 1994, *supra* note 215, art. XXI.

228. TRIPS Agreement, *supra* note 144, art. 31; Ministerial Declaration, *On the TRIPS Agreement and Public Health*, ¶ 5, WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (adopted Nov. 14, 2001) [hereinafter Doha Declaration].

229. Compare with Michael J. Hahn, *Vital Interests and the Law GATT: An Analysis of GATT's Security Exception*,12 MICH. J. INT'L L.558, 578 (1991) (cautioning that abuses might happen).

230. Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions* 18 J. INT'L ECON. L. 449, 455 (2015).

231. *Id.*

232. Compare with William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 314 (2008) (noting that "tri-

clause is explicitly self-judging. For example, article XI of the US-Argentina BIT provides that the treaty "shall not preclude the application by either party of measures necessary for. . . the protection of its essential security interests."[233] By its terms, the clause is not explicitly self-judging because it refers to "measures necessary for" rather than "measures that the state considers necessary."[234] Arbitral tribunals have thus reviewed whether certain measures were necessary for the protection of essential security interests. In *LG&E*, the Tribunal held that the exception was not self-judging and required substantive review. The Tribunal added that had the exception been self-judging, it would nonetheless be subject to good faith review. However, the tribunal held that the exception excused Argentina from any obligation to pay compensation during the period of the emergency. Argentina successfully relied on the exception to shield its economic emergency measures from liability.[235]

Parallel World Trade Organization jurisprudence indicates that international tribunals have traditionally demonstrated a high level of deference towards state invocation of the national security exception.[236] The exception design in international investment treaties and GATT article XXI already enables a balance between Members' security concerns and the economic interests of the international community in favor of the former.[237] Because national security matters are paramount concerns relating to the very existence of states, van Aaken argued that arbitral tribunals should not second-guess the decisions of national policy-makers.[238]

In conclusion, arbitral tribunals should adopt a balanced approach in interpreting investment treaties by considering both the need to protect foreign investment and the state's duty to protect public health.[239] If the relevant exception is self-judging, state measures should nonetheless be subject to a good faith review. If the exception is not self-judging, an objective assessment will avoid second-guessing state decisions, while preventing abuse of

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bunals, however, took diametrically different approaches to the NPM clause of the U.S.-Argentina BIT.")

233. Arg.-U.S. BIT, *supra* note 219, art. XI.

234. *See id.*

235. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf.

236. *See*, *e.g.*, Panel Report, *Russia—Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

237. Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT'L L. UNBOUND 45, 49 (2019).

238. van Aaken, *supra* note 218, at 524.

239. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision of Jurisdiction, ¶ 70 (Apr. 27, 2006), https://www.italaw.com/cases/382 (calling for a "balanced interpretation", "taking into account both state sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities [on the one hand] and the necessity to protect foreign investment and its continuing flow [on the other].").

the law, ensuring that good faith and reasonableness are maintained and preserving the rule of law. Furthermore, a harmonious interpretation of international legal obligations is required by article 31(3)(c) of the Vienna Convention on the Law of Treaties, which calls for the consideration of other international treaties concluded between the parties when arbitral tribunals interpret given international instruments.[240]

C. *Customary International Law Defenses*

State measures can also be justified under customary international law defenses such as *force majeure*, distress, and necessity.[241] In a given case, the existence of a circumstance precluding wrongfulness does not terminate the obligation; rather, it "provides a justification or excuse for nonperformance while the circumstance in question subsists."[242] In other words, circumstances precluding wrongfulness "operate as a shield rather than a sword"[243] "against an otherwise well-founded claim for the breach of an international obligation."[244] The burden of proof to invoke these defenses rests on the party alleging excuse.[245]

Customary international law defenses are generally studied together with the laws of state responsibility, that is, the principles governing when and how a state is held responsible for a breach of an international obligation.[246] While the International Law Commission Articles on State Responsibility ("ILC Articles")[247] constitute an effort to codify such defenses, some of its provisions remain controversial.[248] Composed by eminent scholars, the Articles can (and have) influence(d) arbitral and scholarly developments.[249] Nonetheless, they cannot freeze the development of custom-

240. VCLT, *supra* note 194, art. 31(3)(c).

241. *See generally* Helmut Philipp Aust, *Circumstances Precluding Wrongfulness*, *in* PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW 169, 207 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

242. Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, of its Fifty-Third Session, U.N. Doc, A/56/10, at 71 (2001).

243. *Id.*

244. *Id.*

245. Joost Pauwelyn, *Defences and the Burden of Proof in International Law*, *in* EXCEPTIONS IN INTERNATIONAL LAW 88, 91–92 (Lorand Bartels & Federica Paddeu eds., 2020).

246. *See*, *e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 793–99 (6th ed. 2008).

247. *See* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/49 (Vol. I)/Corr.4 (Dec. 12, 2001) [hereinafter ILC Articles].

248. David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 857 (2002).

249. Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L & COMP. L.Q. 535, 535 (2014).

ary law that has evolved over the past decades. Moreover, concerns have arisen that—at least with regard to the circumstances precluding wrongfulness—the ILC Articles may endorse an excessively legalistic approach through endorsing a cumulative list of demanding requirements, the consideration of which renders the invocation of any defense a fruitless exercise.

1. Force Majeure

Force majeure (a superior force, *vis major*) generally refers to "an event that can be neither anticipated nor controlled."[250] It includes geopolitical events, such as war, sabotage, and terrorism, and natural disasters, such as hurricanes, tornados, floods, volcanic eruptions, and earthquakes that render a given obligation materially impossible to fulfill.[251] *Force majeure* (*vis major*) reflects the broader general principle of law that no one is expected to perform the impossible (*ad impossibilia nemo tenetur*) and that obligations must be possible to be legally binding.[252] The precise effects of invoking a *force majeure* may depend on the duration of the event—"if it is of limited temporary effect, then performance is suspended."[253] As soon as the irresistible force is no longer present, performance is expected.[254]

There is, however, no uniform definition of *force majeure*. The ICC updated its *force majeure* clause in March 2020 in response to the coronavirus crisis, defining it as "the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract."[255] Under the ILC Articles, *force majeure* justifies non–compliance if a given event occurred that was unforeseen or irresistible "beyond the control of the state,"[256] and made it "materially impossible" to perform an obligation.[257] The state must not have contributed to the situation and must not have assumed the risk of the situation occurring.[258] The fulfillment of the above requirements makes it difficult for states to invoke *force majeure*.

250. *Force Majeure*, BLACK'S LAW DICTIONARY (3d ed. 2006).

251. Matthew Jennejohn, Julian Nyarko & Eric Talley, *COVID-19 as a Force Majeure in Corporate Transactions*, *in* LAW IN THE TIME OF COVID-19 142 (Katharina Pistor ed., 2020).

252. ILC Articles, *supra* note 247, art. 23.

253. Christian Twigg-Flesner, *A Comparative Perspective on Commercial Contracts and the Impact of COVID19 - Change of Circumstances, Force Majeure, or What?, in* LAW IN THE TIME OF COVID-19 155, 156 (Katharina Pistor ed., 2020).

254. *Id.*

255. *Id.*

256. ILC Articles, *supra* note 247, art. 23.1.

257. *Id.*

258. *Id.* art. 23.2.

Force majeure has not played a leading role in recent arbitral jurisprudence, but this may change soon.[259] Therefore, it is useful to examine some historical precedents briefly. Early cases suggest it is often difficult to demonstrate that it is impossible to make payments or fulfill obligations even in the context of a financial crisis. For instance, in the *Russian Indemnity Case*, the financial difficulties of the Ottoman Empire were insufficiently grave to constitute *force majeure* and excuse the repayment of indemnities due under the 1879 Treaty of Peace between Russia and Turkey to Russian subjects for losses incurred during the Turkish–Russian War of 1877–78.[260] Similarly, in the *Serbian Loans* case, Serbia claimed that *force majeure* exempted it from the repayment of debt to French bondholders because, after the war, it was impossible to pay the debt in gold francs. The Permanent Court of International Justice (PCIJ) held that it was not impossible for the government to pay in paper francs.[261]

More interesting is the jurisprudence related to *force majeure* invoked during a humanitarian crisis or armed conflict. In such cases, foreign investors have invoked *force majeure* in order to relieve themselves from their obligations. As for the responsibility of states, customary international law provides that "a State cannot be held responsible either in case of popular insurrection, natural catastrophe, war situation or national state of emergency which often constitute force majeure situations."[262] In the *Greco-Bulgarian Communities Advisory Opinion*, the PCIJ held that Greece should not oust Greek refugees that it had settled in housing owned but left empty by Bulgarians, and that it had to pay compensation to the Bulgarians.[263] In *French Company of Venezuelan Railroads*, Venezuela ceased to pay sums it owed to a French investor, in the aftermath of a revolution, invoking *force majeure*.[264] The umpire upheld the defense: "[the State's] first duty was to itself. Its own preservation was paramount . . . the appeal of the company

259. Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 464, 464 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2012).

260. *See* Russian Claim for Interest on Indemnities (Russ. v. Turk.), Case No. 1910-02, Tribunal Award, at 1 (Perm. Ct. Arb. 1912), http://www.worldcourts.com/pca/eng/decisions/1912.11.11_Russia_v_Turkey.pdf (describing the Arbitral Tribunal constituted by virtue of the arbitration *compromis* signed at Constantinople between Russia and Turkey, July 22/August 4, 1910, 11 RIIA 431 (1912)).

261. Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of the Serbs, Croats and Slovenes), Judgment, 1929 P.C.I.J. (ser. A) No.70, at 33–40 (July 12).

262. Jalal El Ahdab & Nadine Ghassan-Martin, *Investment and Arbitration in Libya: From Old to New, From Certainties to Uncertainties*, *in* QUADERNI DEI COLLOQUI DELL'ARBITRATO INTERNAZIONALE 1, 12 (Milan Chamber of Arb. ed., 2011).

263. Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Greece v. Bulg.), Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 34–36 (Aug. 31).

264. Fr. Co. of Venez. R.R. Case (Fr. v. Venez.), 10 R.I.A.A. 285, 353 (1904).

for funds came to an empty treasury or to one only adequate to the demands of the war budget."[265]

In the *Lighthouse* case, Greece requisitioned a lighthouse owned by a French company during World War I. The lighthouse was subsequently destroyed by enemy action. The Tribunal upheld Greece's claim of *force majeure*.[266] In the *Gill* case, sudden and unforeseen action by rebels destroyed the house of a British national residing in Mexico. The Commission held that failure to prevent or punish such destruction was imputable to Mexico. Nonetheless, in an *obiter dicta*, it stated that,

> there may be a number of cases, in which absence of action is not due to negligence or omission but to the impossibility of taking immediate and decisive measures, in which every Government may temporarily find themselves, when confronted with a situation of a very sudden nature. . . In those cases no responsibility will be admitted. . .

This is because of governments' genuine impossibility to take action.[267] In *RSM Production Corporation v. Central African Republic*,[268] the Arbitral Tribunal held that the armed conflict in the Central African Republic constituted *force majeure*, thus suspending RSM's obligation.[269]

Several commentators have proposed that the outbreak of the coronavirus pandemic "potentially amounts to an unforeseen event or an irresistible force triggering a situation of *force majeure*."[270] According to the mayor of Manaus, a city in the Amazon, the pandemic put the city "well beyond" a state of emergency; it amounted to "a state of utter disaster . . . like a country that is at war—and has lost."[271] He even compared the spread of the pandemic to a tsunami.[272] Certainly, as the Director of the World Health Organization pointed out, "[t]he global spread of the virus has overwhelmed health systems, and caused widespread social and economic disruption. . . This pandemic is much more than a health crisis."[273] *Force majeure* does not

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265. *Id.*

266. Lighthouses Arb. (Fr. v. Greece), 12 R.I.A.A.155, 219–20 (Perm. Ct. Arb. (1956).

267. Gill v. United Mexican States (Gr. Brit. v. Mex.), 5 R.I.I.A 159, 159 (1931).

268. RSM Prod. Corp. v. Cent. Afr. Rep., ICSID Case No. ARB/07/02, Decision on Annulment, ¶ 185 (Dec. 7, 2010), https://www.italaw.com/cases/4880.

269. *Id.* ¶ 97.

270. Federica Paddeu & Kate Parlett, *COVID-19 and Investment Treaty Claims*, KLUWER ARB. BLOG (March 30, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/.

271. Tom Phillips & Fabiano Maisonnave, *Utter Disaster: Manaus Fills Mass Graces as Covid-19 Hits the Amazon*, GUARDIAN (Apr. 30, 2020), https://www.theguardian.com/world/2020/apr/30/brazil-manaus-coronavirus-mass-graves.

272. *Id.*

273. *COVID-19 Strategy Update, 14 April 2020*, WORLD HEALTH ORG. (Apr. 14, 2020) https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0.

apply where "a circumstance render[s] performance more difficult or burdensome."[274] Concerning state contribution,[275] it is clear that especially when the pandemic started, but also when it affected more and more countries, states did not have sufficient information to foresee the global spread of the pandemic and organize a comprehensive plan to fight the same.[276] Therefore the COVID pandemic may constitute a *force majeure.*

2. Distress

Distress is another circumstance precluding wrongfulness and relates to situations in which the state "has no other reasonable way"[277] of saving the life of its population.[278] To successfully plead the defense of distress, a state must also demonstrate that it did not contribute to the situation and that the selected course of action did not create a comparable or greater peril.[279] In other words, in circumstances of distress, the state has "in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand."[280]

The existing threat posed by the coronavirus pandemic to the lives of state populations is uncontroversial: "the fate of the population is within the control of the central authorities."[281] As aptly pointed out by commentators, "whether the other requirements are likely to be met will depend on the particular measure adopted, its impact, and the particular circumstances."[282] Moreover, it will ask "if the international obligation in question excludes the possibility of invoking necessity" or "if the state has contributed to the situation of necessity.[283]

In conclusion, it seems that states could successfully invoke distress to justify conduct that would otherwise be in breach of international law if measures were adopted during the pandemic.

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274. *See* Rainbow Warrior Arbitration (N.Z. v. Fr.) 10 R.I.A.A. 215, 253 (1990).

275. *C.f.* Libyan Arab Foreign Inv. Co. v. Burundi, Civ. [Tribunal Arbitral], Belg., Mar. 4, 1991, RBDI, 1990, 517, 538 (holding that "the alleged impossibility is not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of the state.")

276. Loïc Berger, Nicolas Berger, Valentina Bossetti, Itzhak Gilboa, Lars Peter Hansen, Christopher Jarvis, Massimo Marinacci, and Richard D. Smith, *Uncertainty and Decision-Making During a Crisis: How to Make Policy Decisions in the COVID-19 Context?* 3 (Becker Friedman Inst. for Econ., Working Paper No. 95, 2020).

277. ILC Articles, *supra* note 247, art. 24(1).

278. *Id.*

279. *Id.* art. 24(2).

280. *See* Rainbow Warrior Arbitration (N.Z. v. Fr.) 10 R.I.A.A. 215, 253 (1990).

281. Paddeu & Parlett, *supra* note 270.

282. *Id.*

283. *Id.*

3. Necessity

The necessity defense is part of customary international law.[284] Necessity historically accounts for an expression of self-defense and the "inherent natural right to self-preservation."[285] It is also codified in article 25 of the ILC Articles.[286] To successfully plead necessity, a state must demonstrate that its act "is the only way for the state to safeguard an essential interest against a grave and imminent peril; and does not seriously impair an essential interest of the state or states toward which the obligation exists, or of the international community as a whole."[287] Necessity cannot be invoked "if the international obligation in question excludes the possibility of invoking necessity" or "if the state has contributed to the situation of necessity."[288] or "if the state contributed to the situation of necessity."[289] While "there is room for disagreement about the precise boundaries"[290] of the necessity defense and its application in given cases, the International Law Commission considers that all requirements must be satisfied cumulatively for its successful application.[291]

Necessity differs from *force majeure.* In cases of necessity, although the performance of an obligation remains possible, a state voluntarily violates the commitment to protect a vital interest in a grave and imminent peril.[292] In contrast, in cases of *force majeure*, the state's will is irrelevant; the obligation is materially impossible to perform.[293] As Heathcote points out, "Like distress, necessity is a situation of relative impossibility;"[294] nonetheless, it differs from distress as "necessity does not [necessarily] pertain to the safeguarding of human life."[295]

The survival of a state's population[296] and *a fortiori* the well-being of the international community constitutes an essential interest.[297] The spread

284. Case Concerning the Gab íkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. No. 92, at 40 (Sept. 25).

285. Bjorklund, *supra* note 259, at 465.

286. ILC Articles, *supra* note 247, art. 25.

287. *Id.* art. 25.

288. *Id.* art. 25.

289. *Id.* art. 25.

290. Bjorklund, *supra* note 259, at 474.

291. *Id*.

292. *Id.* at 462, 468.

293. Sarah Heathcote, *State of Necessity*, OXFORD BIBLIOGRAPHIES, Nov. 2, 2017, DOI 10.1093/OBO/9780199796953-0025.

294. *Id*.

295. *Id*.

296. *See* Roberto Ago (Special Rapporteur on the Internationally Wrongful Act of the State), *Addendum to the Eighth Rep. on State Resp.*, 14, U.N. Doc. A/CN.4/318/Add.5-7 (Jun. 19, 1980).

297. National Grid P.L.C. v. Argentine Republic, Award, ¶ 245 (UNCITRAL Arb. Trib. 2008), https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf.

of the coronavirus pandemic arguably amounts to a grave and imminent peril, a threat of harm to the world's population. Preventing the spread of the pandemic not only does not impair a vital interest of other states but also enhances the protection of global public health.

Addressing whether state measures are the only way to protect essential interest requires a comprehensive assessment of the measure. As Bjorklund argued, "as other alternatives will nearly always be available, such a strict interpretation of the requirement would seem to defeat any defence."[298] In *LG&E v. Argentina*, the Tribunal concluded that the economic recovery package adopted by Argentina was the only way to respond to the financial crisis. The fact that there could be other means, in theory, did not deny the fact that a comprehensive response was needed in practice and that the state had no choice but to act.[299] The Tribunal concluded that while Argentina may have had several responses at its disposal, this did not preclude necessity, the need to act.[300]

As to the non-contribution criterion, arbitral tribunals have adopted diverging interpretations. For some tribunals, "well-intended but ill-conceived policies"[301] exclude reliance on the plea.[302] Other tribunals have held that only fault can exclude necessity.[303] Some could argue that states' underfunding of health care systems may potentially preclude reliance on necessity. But the argument proves too much, as countries have faced budgetary constraints after the financial crisis, and the coronavirus pandemic represents an unprecedented circumstance that has deeply affected even the most advanced health care systems.

The relationship between treaty exceptions and defenses under customary international law has been discussed in a number of arbitrations in the aftermath of Argentina's financial crisis. According to the CMS Annulment Committee, the essential security provision of investment treaties is a separate defense from the necessity defense under customary international law.[304] In case of a conflict between a treaty exception and a customary law defense, "the application of the *lex specialis* principle will point to the more particular or more special rule."[305] Therefore, the treaty standard should be

298. Bjorklund, *supra* note 259, at 485.

299. See LG&E Energy Corp. v. Argentine Republic*,* ICSID Case No. ARB/02/1, Decision on Liability, ¶ 257 (Oct. 3, 2006), https://www.italaw.com/cases/621.

300*. See id.* ¶ 239.

301. Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶ 356 (June 21, 2011), https://www.italaw.com/cases/554.

302**.** *See id.*

303**.** *See* Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 711 (Dec. 8, 2016), 18 ICSID Rep. 554 (2020).

304*. See* CMS Gas Transmissions Co. v. Argentine Republic, ICSID ARB/01/8, Annulment Proceedings, ¶ 132–133 (September 25, 2007), 14 ICSID Rep. 151 (2009).

305. Christina Binder, *Changed Circumstances in Investment Law: Interfaces Between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine*

taken as the primary basis of reference. This approach is not only conceptually clear, but it is also in line with international standards and the will of the treaty parties.[306]

The number of cases arising in the aftermath of the Argentine economic crisis demonstrates that arbitral tribunals reluctantly weighted human rights considerations in the adjudication of economic crisis-related disputes, focusing instead on the economic dimension. The coronavirus pandemic now challenges this traditional interpretive stance, as it requires full use of the flexibilities that international investment law offers. The nature of the crisis caused by the pandemic is different from any economic crisis. In the case of an economic crisis, one could argue that such a crisis was triggered by a state's own actions or omissions. But this pandemic is different. In finding a balance between commitment and flexibility, arbitral tribunals should permit flexibility in relation to good faith measures adopted in new and unforeseen circumstances, while foreclosing purely opportunistic treaty breaches.

4. *Rebus Sic Stantibus*

The inherent tension between continuity and change characterizes the development of international law. On the one hand, one of the fundamental pillars of international law is the basic rule that treaties must be complied with, *pacta sunt servanda*.[307] Treaty stability enables the predictability, certainty, and rule-based development of international relations. On the other hand, the principle that a fundamental change of circumstances enables derogation from, or suspension of, treaty obligations, *rebus sic stantibus*, expresses "considerations of justice, particularly when compliance with treaty obligations becomes overly burdensome."[308]

The principle of change of circumstances is one of the fundamental principles of international law.[309] If a fundamental change of circumstances has occurred after the signing of a treaty, that the parties could not have expected at the time of the negotiations, the contracting States may invoke the principle of change of circumstances in order to protect their legitimate interests.[310] Indeed, if the rights and obligations assumed by the contracting parties became seriously unbalanced and the treaty was still complied with, this would obviously be unfair.[311]

Crisis, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 608, 617 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009).

306. *See id.* at 619.

307. *See* VCLT, *supra* note 194, art. 27.

308. Binder, *supra* note 305, at 608.

309. *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMAMENT COURT OF INTERNATIONAL JUSTICE 166 (Grotius Publ'ns Ltd. Cambridge 1982).

310. *See id.* at 166.

311. *See id.* at 166–67.

Alberico Gentili (1552–1608), an Italian religious refugee and Regius Professor of civil law at the University of Oxford, was the first to translate the notion of *rebus sic stantibus* from canon law into the law of nations.[312] Gentili acknowledged that the law of nations is dynamic and can be adapted to emerging needs.[313] While treaties should be respected, *pacta sunt servanda*, provided affairs remain in the same condition, *rebus sic stantibus*, Gentili claimed that a fundamental change of circumstances could justify their breach.[314] For Gentili, if a term of a treaty became harmful or unjust, it should no longer be regarded as valid.[315] For instance, if a state promised help to an ally, but was assailed by so great a force that it could hardly maintain its own defense, it would no longer be bound to render aid.[316] The general clause did not belong to ancient Roman law; rather, it originated in medieval canon law, which tended to moderate the rigor of Roman private law with considerations of equity.[317] The civilians later adopted it, and Gentili introduced it into international law, where it has remained to the present.

Other scholars, such as Hugo Grotius (1583–1645), rejected the applicability of a similar concept in international relations, as it could destabilize the international order, jeopardize the foundations of the system, and alter the content of legal obligations.[318] In other words, for Grotius, the idea of *rebus sic stantibus* was a way to overturn the sanctity of contracts and an attempt to avoid compliance with international obligations and state responsibility.[319] Nonetheless, because factual circumstances change, states have accepted the need to insert some flexibility into their international commitments to maintain some equitable balance between their rights and obligations under international law.

As a consequence, the notion of *rebus sic stantibus* has become part of international law. The doctrine is part of customary international law and is restated in the 1969 Vienna Convention on the Law of Treaties ("VCLT").[320] Nonetheless, the VCLT poses a very high threshold for the determination of whether a fundamental change of circumstances occurred, and only allows for the termination or suspension of a treaty.[321] It does not

312. *See* VALENTINA VADI, WAR AND PEACE—ALBERICO GENTILI AND THE EARLY MODERN LAW OF NATIONS 12 (2020).

313. *See id.*

314. *See* ALBERICO GENTILI, DE IURE BELLI LIBRI TRES (1612), *reprinted in* 2 THE TRANSLATION OF THE EDITION OF 1612 at 360, 365 (John C. Rolfe trans., 1933).

315. *See id.*

316. *Id.*

317. VADI, *supra* note 312, at 486.

318. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1625), *reprinted in* NATURAL LAW AND ENLIGHTENMENT CLASSICS 389, 426 (Richard Tuck & Jean Barbeyrac eds. 2005).

319. *See id.* at 427.

320. *See* VCLT, *supra* note 194, art. 62.

321. *See id.*

include the renegotiation or adaptation of a treaty to the change of circumstances.[322] Therefore, scholars contend that the law of treaties does not adequately accommodate change.[323] Because *rebus sic stantibus* suspends the functioning of a treaty, it has been rarely invoked in international law, and international courts have been cautious in interpreting the *rebus sic stantibus* clause. The said courts view the *rebus sic stantibus* notion as an exception to the rule of *pacta sunt servanda* and generally interpret treaty exceptions restrictively.[324]

Nonetheless, if the *rebus sic stantibus* doctrine is part of customary law and is well codified in treaty law, there is no reason to interpret such principle so restrictively as to make it impossible to apply. If it is part and parcel of the architecture of international law, there must be a powerful reason for its inclusion in the system. In the Summary Record of the 695th meeting of the International Law Commission, Elias recalled that "the Special Rapporteur had rightly decided in favour of including an article on the doctrine of *rebus sic stantibus*. . . for the very good reason that its omission might open the door to abuses or violations of international law."[325] The r*ebus sic stantibus* doctrine can be compared to an emergency exit. None should use it in normal circumstances, but in case of an emergency—an earthquake, a terrorist attack, or a pandemic—it would be unconscionable and ultimately unlawful not to open such an emergency exit, if needed.

Moreover, the *rebus sic stantibus* doctrine is common to a range of constitutional traditions. For instance, in English common law, the doctrine of frustration applies where an unforeseen and unforeseeable event occurs after a contract has been concluded that makes a performance "radically different" from what was agreed in the contract.[326] The German Civil Code also governs the consequences of a significant change in the circumstances forming the basis of the contract.[327] Similar provisions appear in other civil law

322. *See id.*

323. CHRISTINA BINDER, DIE GRENZEN DER VERTRAGSTREUE IM VÖLKERRECHT (2013).

324. *See, e.g.*, Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1973 I.C.J. 3, ¶ 36 (Feb. 2); Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1973 I.C.J. 49, ¶ 36 (Feb. 2); Case Concerning the Gab ikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 46, 99, 104 (Sept. 25); *see also* Case of the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46 (June 7).

325. Summary Record of the 695th meeting, [1963], 1 Y.B Int'l L. Comm'n 143, at 147, U.N. Doc., A/CN.4/SR.695.

326. Twigg-Flesner, *supra* note 253, at 158 (referring to *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309; 3 B & S 826).

327. *Id.* at 159 (referring to Article 313 of the German Civil Code ("BGB") and explaining that, "[i]f the parties would not have entered into the contract at all or only on different terms, had they foreseen this change, then modification of the contract can be demanded. This is subject to the requirement that, taking account of all the circumstances of the particular case including the contractual risk-allocation, upholding the contract would not be acceptable to one of the parties. If it is not possible to modify the contract, or if the modification cannot rea-

systems.[328] At the international level, article 6.2.2 of the UNIDROIT Principles of International Commercial Contracts (UPICC) deals with hardship, which occurs "where the occurrence of events fundamentally alters the equilibrium of the contract" either because the cost of performing has increased or the value of the performance provided has been reduced.[329] A party can invoke hardship for renegotiating the terms of the contract.

There is no reason why the *rebus sic stantibus* principle could not be invoked by states facing a fundamental change of circumstances. Some investment contracts may specifically include it. Even if it was not mentioned in any contractual instrument, the principle belongs to customary law and may be invoked by states. The change in circumstances must be fundamental; "it has to jeopardize the survival of the state."[330]

In light of this, the call on the international community for an immediate moratorium on all arbitration claims by private corporations against governments and a permanent restriction on all arbitration claims related to government measures targeting health, economic, and social dimensions of the pandemic should be welcome. It expresses the principle of *rebus sic stantibus* while also attempting to bring international consensus on the matter. Such a call expresses the idea that "governments must direct their attention to the urgent control of the COVID-19 crisis" and "good faith recovery efforts."[331] It highlights the need to safeguard the states' regulatory space to protect public health and prevent the risk that investor-state dispute settlement proceedings affect states' capacity to cover the health needs of their citizens and the health of nations more generally.

V. CONCLUSION

As with any branch of international law, international investment law and arbitration face the challenge of maintaining legal continuity, certainty, and stability while also accommodating unforeseen and special circumstances in individual cases and pursuing justice. COVID-19 constitutes an unprecedented crisis, and as leaders develop answers for the crisis now, we

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sonably be expected to be imposed on the party affected, then that party may withdraw from the contract or, in the case of a long-term contract, terminate by giving notice).

328. *Id.* at 159–60 (referring to Article 1195 of the French Civil Code, and explaining that, "[i]f performance would still be possible but unduly onerous on one party, then that party could plead hardship under Art. 1195 of the French Civil Code . . . In a hardship situation, the affected party can request renegotiation of the contract. Where this is rejected by the other party or unsuccessful, the parties can agree to request judicial assistance or terminate the contract).

329. *Id.* at 160.

330. YUSUF CALISKAN, THE DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW: LESSONS FROM THE OECD MAI NEGOTIATIONS AND THEIR APPLICATION TO A POSSIBLE MULTILATERAL AGREEMENT ON INVESTMENT 25 (2002).

331. *See Call for ISDS Moratorium During COVID-19 Crisis and Response*, *supra* note 50.

must look to the past and the future. This article addressed the question of whether there can be a balance between legal stability and flexibility in international investment agreements and in the jurisprudence of arbitral tribunals. Rather than adopting a pro-state, or in the alternative, a pro-investor stand, this article suggests a moderate approach, arguing that there is potential for both continuity and change in international investment law and arbitration. There is potential for continuity because of the vagueness of investment treaty provisions and the flexibilities that international law offers should be used to the fullest. There is potential for change in that the invocation of flexibilities has not always worked well in the past.

The current crisis may provide the impetus for a comprehensive review of how the international investment regime navigates the impact of major unforeseeable events on existing investor-state relations. Is international investment law and arbitration legally well equipped to address change? Assuring an appropriate dialectic between continuity and change can enable states to maintain a just balance of rights and obligations, not only at the time of the negotiation of a treaty, but also during the treaty's lifespan. The article identifies three features of international investment law that can make it flexible to develop harmoniously with, and ideally contribute to, the evolution of international law: the indeterminacy of international investment treaty law, its flexibilities, and the principle of fundamental change of circumstances.

First, the indeterminacy of international investment law and arbitration can enhance its legitimacy. International investment treaties include vague treaty provisions. On the one hand, this constitutes a risk, because there is uncertainty about how arbitral tribunals can interpret such provisions. On the other hand, such vagueness can also constitute an opportunity, because it provides inherent flexibility to international investment treaties. By adopting a holistic approach to treaty interpretation, arbitral tribunals can interpret investment treaty provisions in light of general international law.[332] The tribunals' interpretation will be "crucial for an optimal balance between commitment and flexibility and ultimately for the stability of the system."[333] The fact that U.N. organs have defined COVID-19 as a threat to international peace and security should not be ignored by arbitral tribunals, as doing so would create an unnecessary disconnect between the field of international investment law from general international law.

Second, it is unnecessary to change investment law, but only to interpret the existing flexibilities to the fullest. Any rights, including investors' rights, are not absolute. Instead, they can come into conflict with other values such as public health. The settlement of such conflicts requires the bal-

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332. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMPAR. L.Q. 279, 298, 310, 313 (2005); Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMPAR. L.Q. 361, 361 (2008).

333. van Aaken, *supra* note 117, at 527.

ancing of circumstances on a case-by-case basis. In balancing conflicting values, states have broad autonomy and can adopt different measures, including measures even more stringent than those recommended by the World Health Organization. Arbitrators should control whether the pursued aim is legitimate, and whether there is a rational and reasonable causal relationship between the restriction of economic rights and the promotion of public health. The assessment must be objective.[334] If, nonetheless, arbitrators opt for a more stringent proportionality test—as some scholars argue,[335] but remain far from being a common practice in arbitral awards, at least for the time being—then a certain deference should be granted, as only the state can determine the level of public health protection they aim to ensure.[336] If states feel that they have no flexibility to adopt crucial public health measures, they may exit given treaty regimes. Nonetheless, it would be better that the system enables the full use of the flexibilities it offers, to maintain the unity of the international community in times of crisis.[337] Instead, flexibility can be achieved not only through the adoption of specific exceptions in the text of treaties but also through a sensible interpretation of investment treaty provisions and customary law.

Third and finally, the principle that a fundamental change of circumstances enables termination from, or suspension of, treaty obligations (*rebus sic stantibus*) expresses considerations of justice and equity *infra legem*. As such, it should not be considered to be an anathema to international law, but an important part of the same. The very architects of the international legal system embedded some flexibility in its foundations. Only some flexibility can enable the architecture of international law to withstand the passage of time and allow the international community to save lives and communities.

334. VADI, *supra* note 67, at 187.

335. Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 39 (N.Y.U. Pub. L. Rsch. Paper No. 09-46, 2009).

336. *See* HENCKELS, *supra* note 78, at 21–22.

337. *See* van Aaken, *supra* note 117, 509.